

# **EXHIBIT 4**

1	UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK
2	
3	
4	FIREMAN'S FUND INSURANCE COMPANY, ) ONE BEACON INSURANCE COMPANY, ) NATIONAL LIABILITY AND FIRE ) INSURANCE COMPANY and QBE ) MARINE & ENERGY SYNDICATE 1036, ) Plaintiffs, ) 10-civ-1653 (LAK) v. ) GREAT AMERICAN INSURANCE COMPANY ) OF NEW YORK, MAX SPECIALTY ) INSURANCE COMPANY and SIGNAL ) INTERNATIONAL, L.L.C. ) Defendants. )
5	
6	
7	
8	
9	
10	
11	
12	
13	DEPOSITION UPON ORAL EXAMINATION OF
14	RICHARD CODY WHITTINGTON
15	TAKEN ON BEHALF OF DEFENDANT SIGNAL INTERNATIONAL, LLC
16	
17	Richmond, Virginia
18	Thursday, June 30, 2011
19	
20	
21	
22	
23	
24	
25	

NORFOLK  
757.627.6554RICHMOND  
804.788.8899

ZAHN COURT REPORTING

RICHMOND  
804.788.8899

1	I N D E X
2	DEPONENT
3	RICHARD CODY WHITTINGTON
4	Examination By Mr. Bland
5	Examination By Mr. Nicoletti
6	Examination By Mr. Bland
7	Examination By Mr. Nicoletti
8	Examination By Mr. Bowles
9	Examination By Mr. Nicoletti
10	Examination By Mr. Bland
11	
12	R E Q U E S T E D D O C U M E N T S
13	PAGE NO.
14	118 20
15	330 11
16	E X H I B I T S
17	NO. DESCRIPTION
18	204 Email Chain dated August 27, 2009 from
19	Morano to Whittington
20	205 Email dated August 27, 2009 from
21	Whittington to Morano
22	206 Letter dated September 15, 2009 from
23	Spears to Willis with attachments
24	207 Email Chain dated September 15, 2009 from
25	Morano to Cesare

NORFOLK  
757.627.6554

ZAHN COURT REPORTING

RICHMOND  
804.788.8899

1	Appearances:
2	
3	NICOLETTI HORNIG & SWEENEY By: JOHN A. NIcoletti, Esquire ROBERT A. NOVAK, Esquire 88 Pine Street, 7th Floor New York, New York 10005-1801 jnicoletti@nicolettihornig.com rnovak@nicolettihornig.com Counsel for the Plaintiffs
4	
5	LE BLANC BLAND, P.L.L.C By: DAVID S. BLAND, ESQUIRE MATTHEW C. GUY, ESQUIRE 909 Poydras Street, Suite 1860 New Orleans, Louisiana 70112 dblanc@leblancblanc.com mguy@leblancblanc.com Counsel for the Defendant Signal International, L.L.C.
6	
7	
8	NOURSE & BOWLES, LLP By: LAWRENCE J. BOWLES, ESQUIRE 55 Broadway, 30th Floor One Exchange Plaza New York, New York 10006-3030 lbowles@nb-ny.com Counsel for the Defendant Max Specialty Insurance Company
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	Also Present: Chris Cunningham, Signal International
25	

NORFOLK  
757.627.6554RICHMOND  
804.788.8899

1	E X H I B I T S (Continued)
2	
3	NO. DESCRIPTION
4	208 File Notes
5	209 Dufour Laskay report dated
6	December 9, 2009
7	210 Preliminary Claims Statement
8	211 Max Specialty Property and Casualty Claim
9	Guidelines
10	212 Letter dated August 31, 2009 from Morisse
11	to Massey and Whittington
12	213 York Report Number One
13	214 Email dated October 16, 2009 from
14	Morisse to Massey and Whittington with
15	attachment
16	215 York Report Number Three
17	216 York Report Number Four
18	217 York Report Number Five
19	218 Email Chain dated October 26, 2009 from
20	Cruikshank to Whittington
21	219 York Report Number Six
22	220 Affidavit of Cody Whittington
23	221 Email Chain dated February 5, 2010 from
24	Cruikshank to Whittington
25	

NORFOLK  
757.627.6554

ZAHN COURT REPORTING

RICHMOND  
804.788.8899

E X H I B I T S (Continued)		
NO.	DESCRIPTION	PAGE
222	Email dated February 16, 2010 from Cheglikov to Baker with attachment	268
223	Email Chain dated August 2, 2010 from Cesare to Whittington	287
224	Accounting Statement prepared by Dempsey Partners	300
225	Email Chain dated August 3, 2010 from Whittington to Castillo	301
226	Email Chain Bates-stamped MSI 002723	308
227	Email Chain dated August 9, 2010 from Baker to Bowles	315
228	Letter dated December 8, 2010 from Cunningham to Whittington	342
229	Email Chain dated December 13, 2010 from Hahn to Whittington	344
230	Letter dated December 21, 2010 from Whittington to Cesare	346
231	Letter dated December 21, 2010 from Whittington to Cunningham	347
232	Letter dated April 28, 2011 from Cunningham to Whittington	348

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

1	Deposition upon oral examination of RICHARD CODY WHITTINGTON, taken on behalf of the Defendant Signal International, L.L.C., before Marianne Martini Holmes, RPR, a Notary Public for the Commonwealth of Virginia at large, taken pursuant to Notice, commencing at 9:15 a.m. on Thursday, June 30, 2011, at the Omni Hotel, 100 South 12th Street, Richmond, Virginia; and this in accordance with the Federal Rules of Civil Procedure.
10	RICHARD CODY WHITTINGTON was sworn and deposed on behalf of the Defendant Signal International, L.L.C. as follows:
14	EXAMINATION
16	BY MR. BLAND:
17	Q. Mr. Whittington, I'm David Bland. I represent Signal International in connection with this lawsuit.
19	We're here today to take your deposition.
20	MR. BLAND: Usual stipulations that we've been living by?
22	MR. NICOLETTI: That's correct.
23	MR. BLAND: Okay.
24	Mr. Bowles?
25	MR. BOWLES: Yes.

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

E X H I B I T S (Continued)		
NO.	DESCRIPTION	PAGE
233	Letter dated May 6, 2011 from Whittington to Cunningham	349
234	Email Chain dated May 5, 2011 from Boesen to Whittington	358
235	Max Specialty's Answers to Signal's Crossclaims with Additional Crossclaims Against Signal	362
236	Email dated October 22, 2009 from Whittington to Cruikshank	377
237	Email Chain dated November 2, 2009 from Whittington to Minx	380

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

1	MR. GALATI: That's fine.
2	BY MR. BLAND:
3	Q. You have the right to read and sign your deposition when it comes back in its transcribed form.
5	MR. BLAND: Larry, I'll let you decide on that.
7	MR. BOWLES: We'd like to review and sign.
8	BY MR. BLAND:
9	Q. During the course of the deposition should you not understand my question, just tell me, and I'll repeat it or rephrase it, okay?
11	A. Okay.
13	Q. You have to answer each question out loud with an audible --
15	A. Um-hum.
16	Q. -- response.
17	A. (Nodding head).
18	Q. A nod of the head or a grunt, the court reporter can't take that down. So each response needs to be in words, okay?
21	A. Okay.
22	Q. Should you need to take a break, let me know, as long as there's no question pending and your answer hasn't been given, okay?
24	A. Okay.

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

1 Q. Would you state your name for the record.  
 2 A. Richard Cody, C-o-d-y, Whittington.  
 3 Q. And where do you live?  
 4 A. 3461, the road is Three Chopt, C-h-o-p-t,  
 5 Road, Gum Spring, Virginia 23065.  
 6 Q. And where do you work?  
 7 A. Alterra Specialty Insurance Company.  
 8 Q. And how long have you worked there?  
 9 A. Since October of 1998.  
 10 Q. 1998?  
 11 A. Yes.  
 12 Q. When did Alterra Specialty -- Risk, is that  
 13 what you said?  
 14 A. Yes.  
 15 Q. When did it come into existence?  
 16 A. It's Alterra Specialty Insurance Company.  
 17 Q. And when did it come into existence?  
 18 A. Last year.  
 19 Q. So you've worked for Alterra Specialty  
 20 Insurance Company for one year.  
 21 And did you work for a predecessor company of  
 22 Alterra before that?  
 23 A. Yes.  
 24 Q. And what company was that?  
 25 A. Max, M-a-x, Specialty Insurance Company.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

1 Q. Which specialty schools?  
 2 A. I've attended Vale, V-a-l-e, Tech several  
 3 times for advanced property claims.  
 4 Q. Do you hold any licenses?  
 5 A. Yes.  
 6 Q. What?  
 7 A. Texas and New Mexico.  
 8 Q. In what?  
 9 A. Insurance license.  
 10 Q. Say again?  
 11 A. Insurance license for adjusting.  
 12 Q. In Texas?  
 13 A. Yes.  
 14 Q. And in New Mexico?  
 15 A. Yes.  
 16 Q. And what is the name -- what's the actual name  
 17 of the license? What is the official name of it?  
 18 A. It's property and casualty adjuster license, I  
 19 believe.  
 20 Q. When did you get a Texas property and casualty  
 21 adjuster's license?  
 22 A. This year.  
 23 Q. In 2011?  
 24 A. Yes, sir.  
 25 Q. And what about New Mexico?

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

1 Q. And how long did you work there?  
 2 A. My entire time at both company names was from  
 3 October of 1998. It was a name change only.  
 4 Q. When did Max Specialty Insurance come into  
 5 existence?  
 6 A. My understanding is 1997-'98.  
 7 Q. And has it always been known as Max Specialty  
 8 Insurance?  
 9 A. I believe so, yes.  
 10 Q. What is your current position at  
 11 Max Specialty?  
 12 A. I'm a claims specialist.  
 13 Q. What is your education?  
 14 A. I have a college degree.  
 15 Q. From where?  
 16 A. Old Dominion University.  
 17 Q. And what did you study?  
 18 A. Pre law, political science.  
 19 Q. What year did you graduate?  
 20 A. 2001.  
 21 Q. And have you had any other post-college  
 22 education?  
 23 A. Other than industry-affiliated? No other.  
 24 Q. Seminars, that sort of thing?  
 25 A. Specialty schools.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

1 A. Same.  
 2 Q. How did you come to get licensed in Texas and  
 3 New Mexico for property and casualty this year?  
 4 A. We were required to take an examination given  
 5 by the State.  
 6 Q. And why did you do that?  
 7 A. It was a requirement from my supervisor.  
 8 Q. During the course of your handling of the  
 9 Signal drydock loss, you were not licensed in Texas?  
 10 A. No.  
 11 Q. As a claims specialist at Alterra, what types  
 12 of risks do you adjust?  
 13 A. Can you clarify "types of risk"?
 14 Q. Do you deal with property claims, marine  
 15 claims?  
 16 A. I deal with property and inland marine claims.  
 17 Q. How long have you dealt -- well, let me ask  
 18 you, what is your job as a claims specialist? What do  
 19 you do?  
 20 A. I receive report of the claim, confirm  
 21 coverage, initiate an investigation, document my file,  
 22 my computer file, make recommendations usually to my  
 23 supervisor.  
 24 Q. Who's your supervisor?  
 25 A. Vice-president Steve Boesen, B-o-e-s-e-n.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

21

Q. Did you speak with Mr. Morano after his deposition yesterday?

A. I had contact with Mr. Morano but did not speak of his deposition.

Q. Have you talked to anyone else in preparing for the deposition?

A. I've spoken to Mr. Boesen.

Q. When did you do that?

A. Various times this week.

Q. What did you talk about with him?

A. Mostly location of certain documents in the file.

Q. Did you speak with anyone else?

A. No, sir.

Q. Did you review the underwriting file?

A. No.

Q. Have you --

A. Other than -- excuse me. Other than the Heller report out of that file.

Q. Have you ever reviewed the underwriting file?

A. Yes.

Q. When did you do that?

A. Soon after receipt of the initial claim.

Q. In August of 2009?

A. Yes.

23

Q. Has that been produced?

A. I have never seen what's been produced other than the attachments to the file.

MR. BLAND: We call for the production of that.

MR. BOWLES: Mr. Whittington produced certain notes which appear to be mostly -- or all communications with counsel, so they would be withheld.

MR. BLAND: That's not what I'm talking about.

His diary, his chronological listing that he just said he has has not been produced.

MR. BOWLES: I don't believe we received any such thing, but I'll double-check.

THE DEPONENT: The -- are we speaking of the diary?

BY MR. BLAND:

Q. I'm speaking of the diary and the documents that you told me about that you kept a chronological listing of what you were doing.

A. Okay. The diary every time you renew it is deleted and erased, so there is no listing.

Q. But that's just -- those are just deadlines, right?

A. Those are just dates of notification for you

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

22

Q. Before August of 2009 when you received notice of the loss of the AFDB-5, you had no contact or work on the Signal account; is that correct?

A. That's correct.

Q. You had nothing to do with the underwriting process for Signal in January of 2009; is that correct?

A. That's correct.

Q. Before August of 2009, did you even know that Max Specialty had an account with Signal International?

A. No.

Q. Do you maintain your own personal file?

A. No.

Q. Do you diary a file?

A. Yes.

Q. What is it when you diary a file? What does that mean?

A. It means you establish a date that a diary report will reflect the need to look at the file, go back to the file.

Q. Do you keep a chronological listing of notes in a file of activities that you have performed or other people are performing --

A. Yes.

Q. -- in the file?

A. Yes.

1 to do something.

Q. What is the other thing you're talking about?

A. In the file, it's called "Notes," and it's where I make entries and explaining the attachments.

Q. Okay.

MR. BLAND: We call for the production of that today during this deposition because I'm not coming back here to do this again. That should have been produced.

MR. BOWLES: I didn't receive that -- such a document, as far as I know. We'll double-check. We can do it today during a break. We'll check.

MR. BLAND: Make a note of this.

BY MR. BLAND:

Q. You can get that, can't you?

A. Yes.

MR. BLAND: We want it brought over here so we can see it.

BY MR. BLAND:

Q. That's part of your guidelines, isn't it?

Have you ever read the claims handling guidelines for Max Specialty?

A. Yes.

Q. Isn't it true that keeping those notes and that diary are a part of your job?

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

49

1 Q. If the drydock sank from operator error and  
 2 the insured sustains an actual loss, is the business  
 3 interruption portion of the policy then triggered?  
 4 A. In general, yes.  
 5 Q. Do you know what the period of recovery is in  
 6 an insurance policy like this?  
 7 A. I believe it's a maximum of two years.  
 8 Q. What does it mean generally, "the period of  
 9 recovery"?  
 10 A. It's dependent on the activities of the  
 11 insured and the type of loss sustained.  
 12 Q. For example, in this case here, it could be  
 13 the time it takes to replace the drydock.  
 14 A. It could be, yes.  
 15 Q. Do you know or have you done any investigation  
 16 as to the time it would take Signal to replace the  
 17 AFDB-5?  
 18 A. It may be in the report from Cuevas, but  
 19 other -- I do not know of any other.  
 20 Q. Now, who was the primary underwriter, the  
 21 primary insurance company on this policy -- on this  
 22 property policy?  
 23 A. Ace/Westchester.  
 24 Q. And have you spoken to anybody at  
 25 Ace/Westchester about the loss of the AFDB-5?

1 A. I believe there was an exclusion in the policy  
 2 pertaining to workmanship defect. This is Westchester's  
 3 policy. I'm not too familiar with their policy other  
 4 than what I've read.  
 5 Q. Did you speak with Joanne Massey ever again?  
 6 A. I believe we communicated by email once or  
 7 twice after.  
 8 Q. About what, do you remember?  
 9 A. Status of the claim, what they were going to  
 10 do. I don't know of anything else at this time.  
 11 Q. Was it important to you to know what Ace was  
 12 going to do about Signal's claim?  
 13 A. Yes.  
 14 Q. And why was that?  
 15 A. It would direct my part of the claim if the  
 16 claim exceeded their coverage. It would give me a time  
 17 period as to when their payment would be. It would give  
 18 me more information as to what their direction to the  
 19 adjuster had been given.  
 20 Q. And it's your understanding that Ace as the  
 21 primary underwriter paid their limits?  
 22 A. Yes.  
 23 Q. When did they do that?  
 24 A. December 2009 or January of 2010. They did  
 25 not tell us.

ZAHN COURT REPORTING  
 NORFOLK 757.627.6554 RICHMOND 804.788.8899

ZAHN COURT REPORTING  
 NORFOLK 757.627.6554 RICHMOND 804.788.8899

50

1 A. Yes.  
 2 Q. And who's that?  
 3 A. The original adjuster was named Joanne, but I  
 4 don't remember her last name. I believe she left the  
 5 company, and then it resulted into a gentleman, but I  
 6 don't remember his name.  
 7 Q. And when was the first time you spoke to  
 8 anyone at Ace about the loss of the AFDB-5?  
 9 A. I could not give you a definitive date, but it  
 10 was several months after the loss occurred.  
 11 Q. Several months?  
 12 A. Yes.  
 13 Q. And that was Joanne Massey?  
 14 A. I believe her name was Massey, yes.  
 15 Q. Did you speak to her on the phone?  
 16 A. Yes.  
 17 Q. And what did you speak to her about?  
 18 A. The circumstances of the loss, what they knew,  
 19 what Ace/Westchester was going to do as far as coverage  
 20 or payment. We discussed a coverage issue I wanted more  
 21 information on.  
 22 I don't know of anything else.  
 23 Q. And that was several months after the sinking?  
 24 A. Yes.  
 25 Q. What was the coverage issue?

1 Q. When did you learn that they had paid?  
 2 A. I think in January of 2010.  
 3 Q. And what was your understanding of what Ace or  
 4 Westchester paid for? What were they paying?  
 5 A. In followup with Ace and Westchester, they did  
 6 not tell me what they paid for.  
 7 Q. They just paid \$10 million in limits.  
 8 A. That's correct.  
 9 Q. They didn't -- either -- neither they nor the  
 10 insured told you where that money was allocated; is that  
 11 correct?  
 12 A. I never had any communications with the  
 13 insured.  
 14 When asked, Ace/Westchester indicated -- they  
 15 did not specify what the payment was for.  
 16 Q. Whether it was property damage, business  
 17 interruption, they didn't say; is that right?  
 18 A. No.  
 19 Q. Is that correct?  
 20 A. That is correct.  
 21 Q. Do you know what information was provided to  
 22 Ace and Westchester -- Ace or Westchester -- Ace and  
 23 Westchester are the same thing, right?  
 24 A. Correct.  
 25 Q. Okay. To your knowledge, do you know what Ace

ZAHN COURT REPORTING  
 NORFOLK 757.627.6554 RICHMOND 804.788.8899

ZAHN COURT REPORTING  
 NORFOLK 757.627.6554 RICHMOND 804.788.8899

51

52

1 Q. Is this the first email that you had regarding  
2 the sinking of the drydock?  
3 A. Yes.  
4 Q. How did you come --  
5 A. To Trip Morano, yes.  
6 Q. How did you come to learn of the sinking of  
7 the drydock?  
8 A. There was a loss notice received through  
9 AmWINS of the occurrence.  
10 Q. Through AmWINS?  
11 A. Yes.  
12 Q. And who at AmWINS sent you that or did they  
13 send it to you?  
14 A. They sent it to an email claims address for  
15 the company. It was received by a support person. I  
16 believe this was referred to the property manager at  
17 that time Mr. Smith who then may have discussed it with  
18 Mr. Boesen for my assignment.  
19 Q. And at first, at least according to your  
20 email, you weren't certain as to whether the sinking of  
21 the drydock was covered by insurance that Max had  
22 placed?  
23 A. There was confusion on my part because there  
24 was two different types or policies in the file.  
25 Q. One was the excess property insurance and one

1 A. No. The policy reflects Mr. Cruikshank is the  
2 designated adjuster as requested by the insured agent,  
3 broker.  
4 Q. Where does he work?  
5 A. Mr. Cruikshank?  
6 Q. Yeah.  
7 A. I don't believe he's resident in Texas. I  
8 believe he's in Louisiana or close to the Gulf area.  
9 Q. Do you know the name of the company he works  
10 at?  
11 A. He works for York, Y-o-r-k, Adjusting.  
12 Q. Have you ever dealt with York Adjusting  
13 before?  
14 A. Yes.  
15 Q. And in what context?  
16 A. My previous employer Cunningham Lindsey used  
17 to do work for York Adjusting.  
18 Q. What about Mr. Cruikshank? Did you know of  
19 his qualifications?  
20 A. Did not know Mr. Cruikshank. Have never met  
21 him before.  
22 (Email dated August 27, 2009 from Whittington  
23 to Morano was marked Deposition Exhibit Number 205.)  
24 BY MR. BLAND:  
25 Q. I'm going to show you a copy of the same

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

1 was the catastrophic excess policy?  
2 A. Correct.  
3 Q. And then you -- so you were emailing  
4 Mr. Morano to learn more about the policies that he had  
5 underwritten?  
6 A. Yes.  
7 Q. And as you've told me, this would have been  
8 the first time you learned of the Signal account; is  
9 that correct?  
10 A. After reviewing his underwriting file, yes.  
11 Q. In August of 2009?  
12 A. Correct.  
13 Q. And then Mr. Morano responded to you later  
14 that morning on August 27, 2009 as is reflected in  
15 Exhibit 204; is that right?  
16 A. That's what the document shows.  
17 Q. And he presented to you the two policies that  
18 he had underwritten; is that right?  
19 A. That's what it states.  
20 Q. As the claims specialist involved with this  
21 claim, after you received notice of the claim, what did  
22 you do?  
23 A. I then went to find or locate the designated  
24 adjuster, Mr. Cruikshank.  
25 Q. Did you yourself retain Mr. Cruikshank?

1 August 27, 2009 email which I'll mark as  
2 Whittington 205.  
3 This one has some handwriting on it.  
4 A. Um-hum.  
5 Q. Whose handwriting is that?  
6 A. It is not mine.  
7 Q. Do you know whose it is?  
8 A. No, sir.  
9 (Letter dated September 15, 2009 from Spears  
10 to Willis with attachments was marked Deposition Exhibit  
11 Number 206.)  
12 BY MR. BLAND:  
13 Q. This is the only copy of this I have for  
14 either one of us.  
15 I'm going to show you -- it may have been  
16 previously marked.  
17 I'm going to mark it as Whittington 206. It  
18 is a September 15, 2009 letter from Signal to Willis of  
19 Alabama with CC to certain people at Signal,  
20 Dufour Laskay, York and Guy Matthews & Associates, and  
21 it attaches a September 2nd, 2009 Statement of Person  
22 Involved in Accident/Incident, two-page document and  
23 some statements. It is a Bates-stamped series MSI --  
24 which is Max Specialty -- 3829 through 3838.  
25 Do you recall receiving a copy of that letter

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

169

1 Q. What about when contact is made by the insured  
 2 to Max Specialty? Is that something normally that  
 3 Max Specialty itself would respond to?  
 4 A. Or if we had claim counsel representing our  
 5 interest, he would.  
 6 Q. So if an insured wrote a letter to you at  
 7 Max Specialty and you had a lawyer, the lawyer would  
 8 answer to the insured, not Max Specialty?  
 9 A. No, it would be Max Specialty's position to  
 10 respond.  
 11 Q. Right.  
 12 And in this case, you've written three letters  
 13 to the assured; is that correct?  
 14 A. That's correct.  
 15 Q. And I'm going to ask you about those in detail  
 16 in a little while.  
 17 But did you write those letters?  
 18 A. I wrote those letters in conjunction with  
 19 counsel.  
 20 Q. Did Mr. Bowles write the letters and you  
 21 signed them?  
 22 A. No.  
 23 Q. We'll go through them.  
 24 But in the event that the assured, regardless  
 25 of whether you have a lawyer, if the assured contacts

ZAHN COURT REPORTING  
 NORFOLK 757.627.6554 RICHMOND 804.788.8899

171

1 Q. To make it easier on the court reporter, I'm  
 2 not offended if when you give your answer, you turn  
 3 towards the court reporter --  
 4 A. Okay.  
 5 Q. -- so that she can fully take down your  
 6 response.  
 7 A. Right.  
 8 Q. And as indicated in Mr. Bland's instructions,  
 9 the court reporter can only take one of us down at a  
 10 time. So please allow me to finish my question. Count  
 11 to 3 in your mind before answering. That should make  
 12 sure that I've finished my question before answering.  
 13 Do you understand that suggestion?  
 14 A. Yes, sir.  
 15 Q. Okay. Let me see if I can get your procedure  
 16 down.  
 17 You got the first notice of claim sometime  
 18 around August 20th, 2009?  
 19 A. Within a day.  
 20 Q. Day of that?  
 21 What is your standard practice when you get  
 22 your first notice of claim?  
 23 A. The claim doesn't come direct to me. It goes  
 24 to support personnel, their supervisor.  
 25 If the loss is significant, it goes to a

ZAHN COURT REPORTING  
 NORFOLK 757.627.6554 RICHMOND 804.788.8899

172

1 you, is that something under the Max Specialty Property  
 2 and Casualty Claim Guidelines that you would respond to  
 3 at Max?  
 4 A. The guideline says I believe yes.  
 5 Q. Do you admonish assureds for contacting you?  
 6 A. No.  
 7 MR. BLAND: Let's take a break.  
 8 (A recess was taken from 3:53 p.m. until  
 9 4:03 p.m.)  
 10 EXAMINATION  
 11 BY MR. NICOLETTI:  
 12 Q. Mr. Whittington, my name is John Nicoletti,  
 13 and together with Rob Novak, my partner, we represent  
 14 the marine liability primary and excess insureds.  
 15 I will be asking you a series of questions.  
 16 To the extent you do not understand my questions, please  
 17 direct your attention -- my attention to that part of  
 18 the question so that we can come to a common  
 19 understanding.  
 20 Do you understand that instruction?  
 21 A. Yes, sir, I do.  
 22 Q. I also remind you of the other instructions  
 23 which Mr. Bland gave you such as you have to answer  
 24 orally as opposed to hand gestures or grunts.  
 25 A. Correct.

ZAHN COURT REPORTING  
 NORFOLK 757.627.6554 RICHMOND 804.788.8899

1 manager for decision whether it's sent to a third-party  
 2 administrator or assigned to an in-house adjuster.  
 3 If it's assigned to me, I get a notification  
 4 by email. I open the file, I read the loss information  
 5 that was sent. I start to figure out what's going on.  
 6 I look at the coverage to see what we afforded and then  
 7 determine whether I need to assign outside investigation  
 8 and go from there.  
 9 Q. All right. Let's -- when you first got the  
 10 report of this loss, do you know if the manager  
 11 considered this to be a significant loss?  
 12 A. This loss was considered significant, and I  
 13 was to work under the property manager Rodney Smith.  
 14 Q. And what do you mean by "significant"? Is  
 15 there a dollar amount on it?  
 16 A. The company is set up with authority  
 17 thresholds. I have a \$75,000 threshold. Mr. Smith has  
 18 a hundred thousand dollar threshold for payments without  
 19 approval. Anything over that goes to the  
 20 vice-president.  
 21 Q. And who is -- who was the vice-president to  
 22 whom you had to go to for any payment over a hundred  
 23 thousand?  
 24 A. Steve Boesen.  
 25 Q. And what is his authority?

ZAHN COURT REPORTING  
 NORFOLK 757.627.6554 RICHMOND 804.788.8899

173

1 A. He has -- hum. He's not really discussed that  
2 with me.  
3 I think he has several hundred thousand.  
4 If the loss is significant, we produce first  
5 a, what's called a notice to underwriter advising the  
6 underwriter of any unusual aspects. In this case, the  
7 loss is over a hundred thousand dollars, which is one  
8 key, that was sent off with a copy to Mr. Boesen.  
9 Q. And which underwriter was that sent to?  
10 A. That was sent to the vice-president of  
11 underwriting, the regional manager, I believe Trip got a  
12 copy, too.  
13 Q. Who is the VP of underwriting?  
14 A. Jon Hahn.  
15 Q. And who was the regional manager?  
16 A. I think at that time it was Tom Krause,  
17 K-r-a-u-s-e.  
18 Q. Okay. I think you indicated to me that this  
19 was known to the manager to be significant from day one;  
20 is that correct?  
21 A. Right.  
22 Let me side-step to complete.  
23 The second report is one that's called  
24 Large Loss Notice in which I produce the report,  
25 recommending reserves, give a brief description of how

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

175

1 Now, you said you sent that Large Loss Report  
2 to Mr. Boesen.  
3 Did you also have a reserve set forth in it?  
4 A. Yes.  
5 Q. And what was the reserve amount?  
6 A. 3.6 million on the real property, 1 million on  
7 the BI.  
8 Q. And these were just preliminary estimates  
9 because you didn't really have any real feel for the  
10 total claim, did you?  
11 A. No, it, it -- at the original reporting time,  
12 it was a question whether this drydock had effectively  
13 destroyed itself, could it be raised, could it be  
14 salvaged, could it be repaired.  
15 A million dollars is quite a lot for reserves.  
16 Mr. Boesen's experience and final approval's  
17 always the case.  
18 Q. Did your reserve of 4.6 million take into  
19 account the \$10 million primary?  
20 A. Yes.  
21 Q. So in other words, at this point in time,  
22 you're valuing the loss at something like 14.6 million.  
23 A. I'm reserving for our exposure which would be  
24 14.6 total.  
25 Q. At the time you did the Large Loss Report, had

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

176

1 extensive the loss is.  
2 I send that to Steve Boesen who looks at the  
3 file, the coverage, looks at my opinion as to the  
4 reserve amounts, whether he agrees with them or not.  
5 He'll change them if he needs to. We'll discuss it if  
6 need to. Then he will send it on to executives in the  
7 company.  
8 Q. You filled out the Large Loss Report in this  
9 case?  
10 A. Yes.  
11 Q. And did you put a dollar amount of the claim  
12 in it?  
13 A. I put I believe from history, it was 3.6 for  
14 the real property, the drydock and 1 million for the BI.  
15 Q. Was the Large Loss Report on the disk?  
16 Because none of us seem to have located it in the  
17 production.  
18 A. The Large Loss Report usually is in the  
19 coverage section, and I -- again, I did not review the  
20 CD to see all the documentation sent. It was supposed  
21 to be placed in there because that is a subfile that is  
22 normally replicated and sent.  
23 Q. We'll check the disk. If not --  
24 A. I'll get you a copy.  
25 Q. Appreciate that.

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

1 you yet pulled a copy of the Max Specialty excess policy  
2 for review to determine the scope of the coverages?  
3 A. Yes.  
4 Q. Okay. At the time that you pulled the  
5 Max Specialty policy, did you also pull a copy of the  
6 primary Westchester policy?  
7 A. The primary Westchester policy I don't believe  
8 was available in the file.  
9 Q. Okay.  
10 A. There was a problem, personal, of which policy  
11 coverage was afforded.  
12 I believe we've seen a copy of that email to  
13 Trip where he, he explained both policies, the CAT  
14 policy, the regular policy to me, and the Westchester  
15 policy I don't believe was attached.  
16 Q. Isn't it true that many of the coverages, if  
17 not all of the coverages, which are underwritten through  
18 the Max excess policy's a follow form to the Ace policy?  
19 A. That is my understanding, yes.  
20 Q. So for you to fill out completely accurate a  
21 Large Loss Report, you actually have to read the  
22 Westchester policy to determine what coverages may have  
23 been triggered.  
24 A. Yes. But in this case with Mr. Morano's  
25 reply, he actually told me what the coverage was.

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

1 Reading the policy was for details.  
 2 Q. Let me ask you. You said that Mr. Morano  
 3 discussed with you the CAT cover which is the  
 4 catastrophic loss excess policy which Max wrote and the  
 5 Max excess property policy.  
 6 A. Right. That was in the email that I think  
 7 we've seen today.  
 8 Q. All right. So insofar as you're preparing  
 9 your Large Loss Report then --  
 10 A. That wasn't done immediately.  
 11 Q. Oh, that's what I'm asking about. Let's get  
 12 this clear.  
 13 A. All right.  
 14 Q. So when you issue your Large Loss Report, you  
 15 have not yet read the Westchester policy and have not  
 16 yet received Mr. Morano's, his opinions or summaries of  
 17 the Westchester coverage; is that correct?  
 18 A. I had received Mr. Morano's email which  
 19 indicated the two policies. The Westchester policy I  
 20 believe he recognized that we didn't have.  
 21 And based on his statement of coverage and  
 22 what I read in the policy for us, then thereafter the  
 23 notice to underwriter was issued, advised them of the  
 24 loss of over a hundred thousand dollars, and then the  
 25 Large Loss Report was, was produced. I don't think it

ZAHN COURT REPORTING  
NORFOLK  
757.627.6554

RICHMOND  
804.788.8899

ZAHN COURT REPORTING  
NORFOLK  
757.627.6554

RICHMOND  
804.788.8899

1 our computation.  
 2 Q. But that's only in regards to the limits. It  
 3 still doesn't tell you your full coverage under Max  
 4 excess policy, correct?  
 5 A. Correct, including the sublimits.  
 6 Q. We'll get to the sublimits.  
 7 A. I know.  
 8 Q. Now, did you ever receive a copy of the  
 9 Westchester policy?  
 10 A. Yes, we did.  
 11 Q. When did you receive that?  
 12 A. I believe that was forwarded through AmWINS to  
 13 Trip. I can't tell you exactly when. Maybe the same  
 14 month, maybe the next month.  
 15 Q. So you would have had the Westchester policy  
 16 in hand sometime September, early October.  
 17 A. Right.  
 18 Q. Now, you indicated to me that on significant  
 19 losses, the vice-president to whom you report would  
 20 assign the claim to be handled by a third-party  
 21 administrator; is that correct?  
 22 A. Yes.  
 23 Q. Was this claim assigned to a third-party  
 24 administrator?  
 25 A. No.

178

1 was immediately. I think it was several weeks later.  
 2 Q. Okay. Let me show you what I think you  
 3 referred to as Mr. Morano's description of the  
 4 coverages. It was marked as Whittington Exhibit 204.  
 5 Is that the email to which you referred?  
 6 A. Yes.  
 7 Q. Okay. Let me have that back for a moment,  
 8 please.  
 9 A. Okay.  
 10 Q. I'm looking at this email. And where in this  
 11 email does Mr. Morano explain to you the various and  
 12 several coverages which exist in the Westchester primary  
 13 policy?  
 14 A. He doesn't.  
 15 Q. Okay. Again I go back to my original  
 16 question.  
 17 Am I correct in my understanding that when you  
 18 prepared your Large Loss Report limiting the reserves to  
 19 physical loss and BI, you had not yet reviewed and  
 20 understood the full scope of coverages under the  
 21 Westchester primary policy; is that correct?  
 22 A. That is correct.  
 23 Q. That's all I wanted.  
 24 A. The policy is in excess of 10 million  
 25 resulting to us. The first 10 million is, is really not

ZAHN COURT REPORTING  
NORFOLK  
757.627.6554

RICHMOND  
804.788.8899

ZAHN COURT REPORTING  
NORFOLK  
757.627.6554

RICHMOND  
804.788.8899

1 Q. How did it come about a significant loss which  
 2 would ordinarily be assigned to a third-party  
 3 administrator was not in this case?  
 4 A. Not all losses that are extraordinary are  
 5 assigned to the third-party administrator. They are  
 6 assigned to me.  
 7 Q. And then do you have the authority to assign  
 8 it out to a third-party administrator?  
 9 A. I do not assign it to third-party  
 10 administrators to do the work that I'm supposed to be  
 11 doing.  
 12 Q. How does it come about that York -- strike  
 13 that.  
 14 York -- I'll give you the exact company name.  
 15 York Specialized Loss Adjusting.  
 16 A. Yes.  
 17 Q. Are you familiar with that company?  
 18 A. Yes, I am.  
 19 Q. Is that a third-party administrator?  
 20 A. One part of it is.  
 21 In this case, this was the field adjusting  
 22 part of their company adjusters. But they do have a  
 23 third-party administrator branch.  
 24 Q. I think you indicated this was their field  
 25 adjuster?

181

1 A. Yes.  
 2 Q. What is a field adjuster?  
 3 A. A field adjuster's a representative of the  
 4 parent company who does inspections of the damages, he  
 5 provides reports, at times he can compute estimates or  
 6 engage consultants and experts. He's the arm of the  
 7 insurance company in the field.  
 8 Q. You say that York Adjusting Company is a  
 9 division of the parent company.  
 10 Which parent company are you referring to?  
 11 A. I believe it's all of York. They call it  
 12 York.  
 13 The third-party administrator function, I  
 14 don't know whether it's the same name or something else.  
 15 But Mr. Cruikshank is with their field  
 16 services.  
 17 Q. I was going to get to that.  
 18 In the context of York acting as a field  
 19 adjuster, this was assigned to Mr. Cruikshank who worked  
 20 for York, right?  
 21 A. Right.  
 22 Q. Who actually engaged York?  
 23 A. The -- well, the policy by Westchester per the  
 24 broker's agreement designates York Adjusting Company.  
 25 Mr. Cruikshank is the designated adjuster.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

183

1 A. Right. We did not.  
 2 Q. Does there come a time, though, when you join  
 3 in the appointment of York to act as the field adjuster  
 4 for Max Specialty?  
 5 A. We are normally carbon-copied on their  
 6 investigative reports. If we request information from  
 7 Mr. Cruikshank, he's to respond. We are a client  
 8 company in this package.  
 9 Other than that, because the first part of the  
 10 claim during investigation is subject to the  
 11 Ace/Westchester policy, they are in direction, they are  
 12 in control.  
 13 Q. I understand Ace is in front. But you're  
 14 contractually also bound to utilize York's field  
 15 adjusting pursuant to the program that Max and Ace wrote  
 16 for Signal, isn't that correct?  
 17 A. By follow form, yes.  
 18 Q. Okay. So in effect, York is also  
 19 Max Specialty's agent, isn't that correct?  
 20 A. That's correct.  
 21 Q. That's all I'm trying to get at. I know  
 22 you're trying to be careful, but I'm -- these are just  
 23 preliminary questions.  
 24 A. That's fine.  
 25 Q. If I'm going to get you, I'll get you before

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

182

1 Q. In the Westchester policy itself.  
 2 A. In the Westchester policy.  
 3 Q. So in effect, Ace appoints -- Ace through  
 4 their insurance contract appoints York as the field  
 5 adjuster.  
 6 A. Let me pretext this.  
 7 The broker and Ace/Westchester agree that this  
 8 is what the insured requests or the broker requests.  
 9 The adjuster's designated in the policy.  
 10 When the loss occurs, I believe in this  
 11 instance the broker notified Mr. Cruikshank direct. I  
 12 don't believe Westchester -- Ace/Westchester called  
 13 Mr. Cruikshank to report the claim. I do not know,  
 14 though.  
 15 Q. I understand that the broker may have made the  
 16 call.  
 17 A. Right.  
 18 Q. But the broker cannot make the call unless  
 19 it's authorized by Ace through its insurance contract,  
 20 isn't that correct?  
 21 A. That is correct.  
 22 Q. So in effect, Ace appointed York.  
 23 A. In summation, yes.  
 24 Q. That's all I'm getting at. I'm just trying to  
 25 find out who appoints who.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

184

1 you know it.  
 2 A. I don't know about that.  
 3 Q. Question. Was Mr. Cruikshank supplied --  
 4 strike that.  
 5 What was the scope of Mr. Cruikshank's  
 6 assignment, if you know?  
 7 A. My opinion --  
 8 Q. No, I don't want your opinion. I want to know  
 9 what you know.  
 10 A. Being that I have no information from  
 11 Ace/Westchester and their assignment of Mr. Cruikshank  
 12 to the loss, I, from his reports, assume that he was to  
 13 go to the loss, determine the damages, photograph them,  
 14 obtain information from the insured as to the  
 15 circumstances of the loss, then continue to pursue with  
 16 the insured information concerning additional claims  
 17 such as the business income claim, the wreck debris  
 18 removal and any other financial losses the insured would  
 19 have.  
 20 Q. So in other words, Mr. Cruikshank was assigned  
 21 to do an investigation into the damages which were  
 22 insured under the Ace primary policy and also insured as  
 23 part of the Max Specialty excess policy; is that  
 24 correct?  
 25 A. That's correct, um-hum.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

185

1 Q. And in doing so, isn't it true that  
 2 Mr. Cruikshank would have received a copy of the  
 3 Ace/Westchester policy and a copy of the Max Specialty  
 4 policy?  
 5 A. Yes.  
 6 Q. Okay. So in doing his job then,  
 7 Mr. Cruikshank has a copy of both, the Ace/Westchester  
 8 primary policy and the Max Specialty excess policy.  
 9 A. Correct.  
 10 Q. Okay.  
 11 Now, do you know which of the York agencies  
 12 Mr. Cruikshank works for?  
 13 A. I'm not sure of his location. He's in the  
 14 Gulf area. I'm not --  
 15 Q. I'm not talking geographics. I'm talking  
 16 about the various York entities, one being a field  
 17 adjusting company, one being a TPA.  
 18 A. He's a field adjuster.  
 19 Q. Well, isn't York Specialized Loss Adjusting  
 20 the third-party administrator?  
 21 A. As a second entity of that company, that's my  
 22 understanding.  
 23 Q. And who does Mr. Cruikshank work for?  
 24 A. Mr. Cruikshank appears to work for the field  
 25 services office.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

187

1 A. That -- yes, that was given to York.  
 2 Q. Okay. What I'm going to ask you is a question  
 3 based on what's in this document to see whether or not  
 4 it refreshes your recollection.  
 5 What that means is you may not have a present  
 6 recollection of a response to my question, but by  
 7 reading something, that may jog your memory. Do you  
 8 understand that instruction?  
 9 A. Yes.  
 10 Q. Okay. Can you read the second sentence of  
 11 this letter into the record?  
 12 A. Second sentence after "We are in receipt"?  
 13 Q. Yes. That's the second sentence, "This loss."  
 14 A. "This loss will be handled out of our York  
 15 Specialized Loss Adjusting Division by Ken Cruikshank."  
 16 Q. Isn't that the third-party administration  
 17 division of York?  
 18 A. I do not know.  
 19 Q. All right. Isn't it true that Mr. Cruikshank  
 20 was retained to act as a third-party administrator  
 21 through York?  
 22 A. In my understanding of his capacity, he was  
 23 not a third-party administrator.  
 24 Q. Who would know better, you or Ace/Westchester  
 25 as to what capacity he was assigned?

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

186

1 MR. NICOLETTI: Let me have this document  
 2 marked as Whittington Exhibit 212.  
 3 It's a York letter dated August 31, 2009  
 4 signed off by Michelle Morisse, executive  
 5 assistant, York SLA Division.  
 6 (Letter dated August 31, 2009 from Morisse to  
 7 Massey and Whittington was marked Deposition Exhibit  
 8 Number 212.)  
 9 MR. BOWLES: This is the first page of the  
 10 document?  
 11 MR. NICOLETTI: I believe it's the cover  
 12 letter.  
 13 THE DEPONENT: It's an acknowledgment. It's  
 14 usually one page.  
 15 MR. BOWLES: Okay.  
 16 BY MR. NICOLETTI:  
 17 Q. Now, this acknowledgment letter is written to  
 18 Joanne Massey, who was the Ace/Westchester claims  
 19 adjuster, and yourself as the Max Specialty claims  
 20 adjuster; is that correct?  
 21 A. Yes.  
 22 Q. And in this letter Michelle Morisse on behalf  
 23 of York SLA Division is acknowledging acceptance of the  
 24 assignment that you have given her -- that you've given  
 25 to York; is that correct?

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

188

1 A. Ace/Westchester, if we bypassed that he was a  
 2 designated adjuster no matter what he did in the policy.  
 3 Q. I understand.  
 4 Now, did Mr. Cruikshank issue reports from  
 5 time to time?  
 6 A. Yes.  
 7 Q. To both Ace/Westchester and to Max Specialty?  
 8 A. Yes.  
 9 Q. And what was the purpose of those reports?  
 10 A. To update the loss as determined to document  
 11 our files.  
 12 Q. And when you received the report from  
 13 Mr. Cruikshank, did you review it?  
 14 A. Yes.  
 15 Q. And if there was something incorrect in that  
 16 report, would you contact Mr. Cruikshank immediately?  
 17 A. Yes.  
 18 Q. And if there was something wrong in that  
 19 report, would you send him something in writing  
 20 requesting that he correct the mistake?  
 21 A. Yes.  
 22 Q. Do you recall issuing any such corrective  
 23 letters to Mr. Cruikshank in this case?  
 24 A. Letters or communication?  
 25 Q. Communications. Any kind of communications.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

189

1 A. Yes.  
 2 Q. And when did you do that?  
 3 A. After determination that the policy that we  
 4 were using had an incorrect deductible.  
 5 Q. And what was the incorrect deductible?  
 6 A. It was a 2 percent deductible in the original  
 7 policy provided both to him and I. Later it was found  
 8 to be a 5 percent deductible.  
 9 Q. Okay. Other than the deductible mistake which  
 10 you picked up on and corrected with Mr. Cruikshank, in  
 11 regards to receiving his reports, did you, did you  
 12 notice any other errors that needed correction?  
 13 A. No.  
 14 MR. NICOLETTI: Let me have this next document  
 15 marked as Whittington Exhibit 213.  
 16 (York Report Number One was marked Deposition  
 17 Exhibit Number 213.)  
 18 BY MR. NICOLETTI:  
 19 Q. This is a document on York letterhead  
 20 consisting of documents with -- bearing Bates Numbers  
 21 MSI 000312 through and including 000354.  
 22 Mr. Whittington, do you have that document in  
 23 front of you?  
 24 A. Yes, I do.  
 25 Q. First question, have you ever seen this

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

191

1 A. Yes.  
 2 Q. And at the top, it has that word "Estimate."  
 3 Do you see that?  
 4 A. Correct.  
 5 Q. All right. What information is to be set  
 6 forth below that term, based upon your familiarity with  
 7 these types of York reports?  
 8 A. Repeat your question, please.  
 9 Q. What information do you expect Mr. Cruikshank  
 10 to set forth in his reports below the subheading  
 11 "Estimate"?  
 12 A. His approximation or estimation of damages per  
 13 coverage.  
 14 Q. Okay. So if he puts an amount down,  
 15 Mr. Cruikshank has made the determination that there's  
 16 coverage for that particular type of issue or event.  
 17 A. Yes.  
 18 Q. Okay.  
 19 Now, first item under "Estimate" is  
 20 Port Arthur drydock, 13,600,000.  
 21 A. Yes.  
 22 Q. You see that?  
 23 So Mr. Cruikshank is telling you that his  
 24 estimation, you have exposure for \$13,600,000 for the  
 25 physical loss of the drydock.

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

190

1 document before?  
 2 A. Yes.  
 3 Q. And what is this document?  
 4 A. This is Mr. Cruikshank's first report.  
 5 Q. And did he issue this on or about  
 6 September 2nd, 2009?  
 7 A. It's handwritten on it September 2nd, 2009.  
 8 It doesn't have a date for the report on it --  
 9 Q. Okay.  
 10 A. -- except for on the second page which  
 11 reflects at the header September 2, 2009.  
 12 Q. Does that refresh your recollection that you  
 13 did receive Mr. Cruikshank's report sometime in the  
 14 first week of September?  
 15 A. Yes.  
 16 Q. All right. At that time, did you review the  
 17 report?  
 18 A. Yes.  
 19 Q. Upon reviewing the report, did you note any  
 20 errors or mistakes in it other than possibly the  
 21 deductible error that you corrected?  
 22 A. Not to my knowledge at this time.  
 23 Q. Now, let me show you, let me direct your  
 24 attention to the second page of the report, MSI 000313.  
 25 Do you see that?

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

192

1 A. Yes.  
 2 Q. Okay. The second item is debris removal, and  
 3 he has \$5 million listed there for that. Do you see  
 4 that?  
 5 A. That is correct.  
 6 Q. And Mr. Cruikshank is telling you that in his  
 7 estimation, that it's going to cost at least \$5 million  
 8 to remove the drydock and clean up the area, and he's  
 9 listed that as a covered item under the Ace/Westchester  
 10 policy.  
 11 A. Correct.  
 12 Q. All right. At any time did you write to  
 13 Mr. Cruikshank and tell him, "You're wrong. There's no  
 14 debris removal coverage for the removal of this drydock  
 15 under the Ace/Westchester policy"?

A. No. The matter of wreck removal, debris
removal was assigned out to counsel by Ace/Westchester

for an opinion.

Q. And how do you know that?

A. Because they contacted me, Mr. Cruikshank I
believe contacted me and asked me in two separate emails

what accountant I wanted to use and was it approved to
assign to Attorney Minx the coverage question concerning

wreck.

Q. That comes much later, doesn't it?

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

1 A. Yes.  
 2 Q. In fact, that doesn't even come up until  
 3 sometime in November or even later, December of 2009,  
 4 isn't that correct?  
 5 A. The best of my knowledge, yes.  
 6 Q. So as of September, neither you nor  
 7 Mr. Cruikshank or the Ace adjuster, whoever that may be,  
 8 because I understand Miss Morisse had left, at this  
 9 stage in time, no one is questioning that \$5 million in  
 10 debris removal coverage is available under the  
 11 Ace/Westchester policy for the removal of the drydock,  
 12 isn't that correct?  
 13 A. Repeat your question.  
 14 Q. As of the writing of this report and your  
 15 receipt of this report, neither yourself, Mr. Cruikshank  
 16 nor the Ace adjuster Joanne Morisse (sic) or her  
 17 successor are questioning the coverage for debris  
 18 removal of the drydock at a total \$5 million, are you?  
 19 A. I cannot speak for Ace/Westchester.  
 20 Q. You can speak for yourself. You didn't  
 21 question it, did you?  
 22 A. No.  
 23 Q. And you had no discussions with Mr. Cruikshank  
 24 where he questioned it at that time.  
 25 A. No.

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

1 Q. Who did you speak to about that issue? Did  
 2 you speak to Mr. Cruikshank or Miss Massey or both?  
 3 A. What issue specifically?  
 4 Q. The questioning of the available coverage for  
 5 debris removal under the property program.  
 6 A. I believe Mr. Cruikshank and Miss Massey both  
 7 discussed this.  
 8 Q. And you had separate discussions with both of  
 9 them?  
 10 A. I do not remember at this time having a  
 11 discussion with Cruikshank or Miss Massey about debris  
 12 removal.  
 13 Q. I'm talking at the time the issue came up  
 14 where they were going to assign that issue of coverage  
 15 for debris removal to counsel.  
 16 Who told you that? Ace/Westchester directly  
 17 or Mr. Cruikshank of York?  
 18 A. I believe Mr. Cruikshank emailed asking if it  
 19 was okay to assign Minx.  
 20 Q. Okay. So the information you got was from  
 21 Mr. Cruikshank.  
 22 A. Correct.  
 23 Q. Did you ever get any direct communications  
 24 from Ace where they questioned coverage for the debris  
 25 removal?

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

1 Q. Isn't that correct?  
 2 A. No.  
 3 Q. Okay. And you got no call from  
 4 Ace/Westchester saying, "We have a question about the  
 5 coverage for debris removal under our primary property  
 6 policy," isn't that correct?  
 7 A. I never received any communication from  
 8 Ace/Westchester.  
 9 Q. All right. That's my question. You never  
 10 received anything from them where they questioned the  
 11 coverage, did they?  
 12 A. Correct.  
 13 Q. For debris removal.  
 14 A. For any --  
 15 Q. At that time.  
 16 A. For any, any subject matter.  
 17 Q. I think you indicated -- excuse me.  
 18 I think you indicated to me that it was  
 19 Ace/Westchester who first raised the question of  
 20 coverage for debris removal for the drydock; is that  
 21 correct?  
 22 A. That's correct.  
 23 Q. And who at Ace raised that issue?  
 24 A. It would have to have been Joanne Massey  
 25 through or, or to Cruikshank.

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

1 A. No.  
 2 Q. How do you know that Mr. Cruikshank was  
 3 talking on behalf of Ace when he requested permission to  
 4 assign counsel to investigate coverage for debris  
 5 removal under the property program as opposed to it  
 6 being his own thought process?  
 7 A. Correct.  
 8 I believe there was a vague -- in my memory,  
 9 there was a communication or in his -- one of his  
 10 reports concerning the MGL carriers, and then that  
 11 became a question as to whether the MGL insurer provided  
 12 coverage for the wreck removal or debris removal.  
 13 Q. I understand that may have triggered the  
 14 inquiry.  
 15 A. Yes.  
 16 Q. I'm asking you is that Ace/Westchester who  
 17 triggers the inquiry or is it Mr. Cruikshank, the field  
 18 adjuster, who does it on his own?  
 19 A. The communication I received from  
 20 Mr. Cruikshank was asking me if it was, if it was  
 21 approved by us to assign to Minx. It did not indicate  
 22 where it came from.  
 23 Q. Okay. By the way, who paid the Minx bill?  
 24 A. I believe it was prorated.  
 25 Q. But as you sit here today, do you recall

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

197

1 having any communication directly with an Ace  
 2 representative other than Mr. Cruikshank from York who  
 3 questioned the availability of debris removal coverage  
 4 under the property program?  
 5 A. To my knowledge at this time, I don't remember  
 6 Ace contacting me to discuss that subject.  
 7 Q. Who actually engaged the Minx office? Was  
 8 that Ace, Max or York?  
 9 A. I don't believe there was any indication who  
 10 called, but I would imagine or assume that  
 11 Mr. Cruikshank did because he had the most investigative  
 12 material.  
 13 MR. NICOLETTI: All right. Let's have this  
 14 next document marked as Whittington Exhibit 214.  
 15 It bears production control numbers MSI 000379  
 16 through and including MSI 000410.  
 17 (Email dated October 16, 2009 from Morisse to  
 18 Massey and Whittington with attachment was marked  
 19 Deposition Exhibit Number 214.)  
 20 BY MR. NICOLETTI:  
 21 Q. Mr. Whittington, can you identify the first  
 22 page of the document, Whittington Exhibit 214? First  
 23 page.  
 24 A. It's a report from --  
 25 Q. No, no. The first page.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

199

1 the drydock, isn't that correct?  
 2 A. That's correct.  
 3 Q. Now, when you received this, did you have any  
 4 discussions with anyone at Ace concerning questions  
 5 about the debris removal as being a covered item under  
 6 the property program?  
 7 A. I, to my knowledge at this time, do not  
 8 remember any communications.  
 9 Q. But if you had a communication or objection,  
 10 it would be in writing, would it not?  
 11 A. It would be in some form of communication or  
 12 notation.  
 13 Q. And you don't recall making any of those  
 14 notations, do you?  
 15 A. At this time I do not remember.  
 16 Q. And if there are none in the file, then you  
 17 made no objection; is that correct?  
 18 A. That could be an assumption, yes.  
 19 Q. Now, at this point in time, did you ever call  
 20 up Mr. Cruikshank to discuss his estimates?  
 21 A. No.  
 22 Q. What did you do when -- what did you do when  
 23 you got the report on or about October 16, 2009?  
 24 A. Reviewed it, read it, made notations in the  
 25 file, attached a copy of them to the file.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

198

1 A. Oh, the first page.  
 2 Okay. From Michelle Morisse to J. Massey and  
 3 me, "Please see attached report to you regarding  
 4 above-captioned claim."  
 5 Q. And, again, this is the report issued by  
 6 Mr. Cruikshank of York.  
 7 A. Correct.  
 8 Q. And that's what appears after the first page.  
 9 That's the document that accompanied the forwarding  
 10 email, correct?  
 11 A. That's correct.  
 12 Q. And this is the second report that he's  
 13 issuing.  
 14 A. Yes.  
 15 Q. Again, under the term "Estimate," he's  
 16 outlining his estimated damages for each of the covered  
 17 items which may arise out of the sinking of the drydock,  
 18 isn't that correct?  
 19 A. Yes.  
 20 Q. And, again, the first entry is Port Arthur  
 21 drydock, 13,600,000. That's for the actual physical  
 22 loss of the drydock, isn't that correct?  
 23 A. Yes.  
 24 Q. And the second line again is debris removal  
 25 estimated at \$5 million. And that's for the removal of

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

200

1 Q. And at this point in time, are you aware that  
 2 there are marine liability -- that there is marine  
 3 liability insurance also available to Signal?  
 4 A. Yes, this report reflects the P and I carrier.  
 5 Q. So even though at this point in time you  
 6 understand that there is a marine liability insurance  
 7 program, you don't make any objection concerning the  
 8 coverage for debris removal under the property program,  
 9 do you?  
 10 A. His recommendation, no.  
 11 Q. In fact, this report actually specifically  
 12 addresses other insurance at MSI 000383.  
 13 A. Yes.  
 14 Q. And under "Other Insurance," he identifies  
 15 that Fireman's Fund writes the GL policy including  
 16 P and I coverage which is endorsed with wreck removal.  
 17 A. Yes.  
 18 Q. So at the time you read this report, you have  
 19 full knowledge that there is other insurance through  
 20 Fireman's Fund for wreck removal, but you do not  
 21 question the availability of debris removal coverage for  
 22 the drydock under the property program, do you?  
 23 A. No, I do not. My policy hasn't been exposed  
 24 because Ace/Westchester hasn't made payment.  
 25 Q. So you're telling me if you believed your

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

201

1 policy was exposed, you would have raised an objection  
 2 at this time?  
 3 A. Yes.  
 4 Q. Yet, you've reserved since day one for  
 5 4.6 million into your layer, didn't you?  
 6 A. Based on what I told you, 3.6 for the drydock,  
 7 1 million for BI. Nothing for debris removal.  
 8 Q. So your policy was exposed.  
 9 A. Yes -- no. Terminology difference here.  
 10 Q. Your policy was not exposed.  
 11 A. Our policy was potentially exposed based on  
 12 the payment first by Ace/Westchester.  
 13 Q. That's correct.  
 14 And if Ace utilized its money to pay the  
 15 estimated items, you'd have to pay the balance above  
 16 10 million.  
 17 A. If I had coverage, yes.  
 18 Q. But at this point, you're not questioning the  
 19 availability of debris removal under the Ace primary  
 20 policy, are you?  
 21 A. No.  
 22 Q. Did you raise any questions about the  
 23 availability of debris removal coverage under the excess  
 24 policy at this time?  
 25 A. No.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

203

1 Q. Now, just to go back real quickly, I note that  
 2 on the 9/2/09 report, he gives a net total property  
 3 damage estimate of 17,218,000.  
 4 A. I'm sorry?  
 5 That's what it states on the first report.  
 6 Q. Right.  
 7 And on the second report, it shows an  
 8 estimated value of 25 million.  
 9 A. That's what it states.  
 10 Q. Okay. Do you have any reason to question his  
 11 estimates?  
 12 A. No.  
 13 Q. Did you ever question his estimates?  
 14 A. No.  
 15 Q. Were you fully aware that these were the  
 16 amounts that were probably payable for this loss, if not  
 17 more?  
 18 MR. BOWLES: Objection.  
 19 BY MR. NICOLETTI:  
 20 Q. You can answer.  
 21 A. Based on his recommendation, that is what he  
 22 suggested.  
 23 Q. Right.  
 24 A. It's not acceptable to Max Specialty what he  
 25 recommends.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

202

1 Q. All right.  
 2 MR. NICOLETTI: Let's have this next document  
 3 marked as Whittington Exhibit 215.  
 4 (York Report Number Three was marked  
 5 Deposition Exhibit Number 215.)  
 6 BY MR. NICOLETTI:  
 7 Q. It has -- it consists of documents bearing  
 8 production numbers MSI 00478 through and including  
 9 MSI 00495.  
 10 Can you identify this document for me?  
 11 A. Mr. Cruikshank's third report dated  
 12 November 3, 2009.  
 13 Q. And the reason you know it's his third report,  
 14 he has a caption "Report Number," the word "three"  
 15 appears next to it.  
 16 A. Yes.  
 17 Q. Is that a standard practice in how he  
 18 identifies each successive report?  
 19 A. Yes.  
 20 Q. Again, this is addressed to Joanne Massey and  
 21 to Cody Whittington; is that correct?  
 22 A. That is correct.  
 23 Q. And did you -- do you recall receiving this  
 24 document on or about November 3rd, 2009?  
 25 A. To my knowledge, yes.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

204

1 Q. It was not acceptable?  
 2 A. It could not.  
 3 Q. Why not?  
 4 A. Let me clarify further. You've hooked me on  
 5 that.  
 6 Reserving is based on recommendations of the  
 7 adjuster. The final decision rests with Max.  
 8 Q. I understand that.  
 9 A. What they reserve.  
 10 Q. But once you reserve, that reflects what you  
 11 believe to be an exposure.  
 12 A. A minimum or maximum, yes.  
 13 Q. Right.  
 14 And when -- at this point in time are you  
 15 still carrying that \$4.6 million reserve?  
 16 A. I believe, yes.  
 17 Q. And at this point in time, that shows you had  
 18 some real exposure for this claim.  
 19 A. Yes.  
 20 Q. All right. And yet up to this point in time,  
 21 you make no objection to the listing of debris removal  
 22 as a covered item under the Westchester primary policy,  
 23 do you?  
 24 A. No indications, no.  
 25 Q. Turning your attention back to Whittington

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

205

1 Exhibit 215, again this is Mr. Cruikshank's third  
 2 estimate -- third report, and, again, he's got the  
 3 estimate for the Port Arthur drydock being 13,600,000  
 4 for the physical loss; is that correct?  
 5 A. That is correct.  
 6 Q. And, once again, the second item is debris  
 7 removal for \$5 million.  
 8 A. That's correct.  
 9 Q. And based upon the way Mr. Cruikshank writes  
 10 his reports, these are his estimated exposures for  
 11 covered items under the Ace/Westchester policy.  
 12 A. Through Ace/Westchester?  
 13 Q. That's what I just said.  
 14 A. And not Max Specialty.  
 15 Q. I'm doing one at a time.  
 16 A. I can't speak for Ace/Westchester. It's not  
 17 my policy.  
 18 Q. Did you consider these to be your exposures  
 19 under the Max Specialty policy once the Ace policy was  
 20 exhausted?  
 21 A. His total amount? No.  
 22 Q. I'm not talking about his total amount. The  
 23 listed items.  
 24 A. The listed items?  
 25 Q. Yes. Maybe not the amounts, but the listed

1 A. No.  
 2 Q. So at this point in time, you believe these  
 3 are covered items under the full property program  
 4 issue -- I mean issued to Signal.  
 5 A. That's a summation I cannot agree to.  
 6 Q. Why not?  
 7 A. You're saying definitely that I did this. You  
 8 have no information or suggestion that I did.  
 9 Q. I'm asking you.  
 10 A. I'm saying yes.  
 11 Q. Yes what?  
 12 A. To your question that you asked.  
 13 Q. That is, that it was your understanding that  
 14 the items listed under the estimate column were covered  
 15 under your policy.  
 16 A. Potentially covered under our policy.  
 17 Q. All right. When you say "potentially  
 18 covered," are you questioning the dollar amount?  
 19 A. Yes, among other things.  
 20 Q. Are you questioning the actual coverage?  
 21 A. Yes.  
 22 Q. At this point in time, did you have questions  
 23 concerning the available coverage for debris removal  
 24 under the property program?  
 25 A. Did I have questions --

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

206

1 items, since he says they are covered items.  
 2 A. Let me backtrack up through your question.  
 3 Q. Mr. Whittington, you've testified to me that  
 4 what goes under the estimate column are those items of  
 5 claim which Mr. Cruikshank believes are covered under  
 6 the Ace/Westchester and Max Specialty policies.  
 7 A. Correct.  
 8 Q. Right.  
 9 That's his understanding.  
 10 A. That's his interpretation, yes.  
 11 Q. Right.  
 12 When you received his November 3rd report  
 13 which listed the Port Arthur drydock for 13.6 million  
 14 and debris removal for 5 million, it was  
 15 Mr. Cruikshank's understanding of the property program,  
 16 that is, the Ace/Westchester primary policy and  
 17 Max Specialty excess policy, that these were covered  
 18 under those policies.  
 19 A. That is his opinion and that was his  
 20 suggestion, yes.  
 21 Q. Okay. At that point in time, did you make an  
 22 objection to these opinions?  
 23 A. No.  
 24 Q. At that point in time, did you have any  
 25 objection to his opinions?

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

1 Q. In November --  
 2 A. -- or did I project questions to someone?  
 3 Q. Did you have questions in your mind as of  
 4 November 3rd, 2009?  
 5 A. At that time, no.  
 6 Q. Okay. And if you didn't have any questions,  
 7 you couldn't possibly project them to anybody.  
 8 A. Correct.  
 9 Q. Okay. We're on the same page.  
 10 A. Yes.  
 11 Q. By the way, do you have any legal training?  
 12 A. No.  
 13 Q. Have you ever dealt before with the situation  
 14 where a floating object was insured under your property  
 15 program?  
 16 A. No.  
 17 Q. And I gather from that then that you have no  
 18 experience as to how the debris removal clauses in a  
 19 property program operate on a floating object which may  
 20 have sank.  
 21 A. Let's phrase it this way. I've never had  
 22 something with debris removal coverage that sank.  
 23 Q. Okay.  
 24 A. I've had inland marine policies in which we've  
 25 retrieved insured items out of the water.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

208

209

1 Q. I was speaking solely about the property  
2 program.  
3 A. You were asking me my experience, though.  
4 Q. I thought I limited it to the property. If I  
5 didn't, I apologize.  
6 A. Clarification is my point.  
7 MR. NICOLETTI: Let's now have this next  
8 document marked as Whittington Exhibit 216. This  
9 does not have Bates stamps on it, so I'll identify  
10 it as the York report number 4 dated November 19,  
11 2009.  
12 (York Report Number Four was marked Deposition  
13 Exhibit Number 216.)  
14 BY MR. NICOLETTI:  
15 Q. All right, Mr. Whittington. We're going to go  
16 through the same series of questions here.  
17 Can you identify the document which I've  
18 marked as Whittington Exhibit 216?  
19 A. Report 4 dated November 19, 2009.  
20 Q. And it's addressed to Mr. Cocker at Ace?  
21 A. I think it's -- actually, I think his name is  
22 Crocker. But it's Cocker on this report.  
23 Q. So it's just a misspelling.  
24 A. I'm not sure.  
25 Q. Okay. So if we rely on the document, it's

1 Q. Just so we can be -- we have a common  
2 understanding, when I use the term "property program,"  
3 do you understand I mean both the primary and excess  
4 policies?

5 A. Yes.  
6 Q. Okay. And you understood that in my prior  
7 questions.  
8 A. Yes. It was not your policy or the insured  
9 you represent.  
10 Q. So once again, the estimate shows the  
11 Port Arthur drydock being valued at 13.6 million as a  
12 covered item?

13 A. Yes.  
14 Q. And it shows debris removal at 5 million as a  
15 covered item.  
16 A. Yes.  
17 Q. When you received this report, did you make  
18 any objections?  
19 A. No.  
20 Q. When you received this report and reviewed it,  
21 did you have any questions that debris removal for this  
22 drydock was covered under the property program issued by  
23 both Ace with the excess by Max Specialty?  
24 A. I believe at that time I was awaiting  
25 Mr. Minx's opinion concerning the coverage question of

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

210  
1 Cocker.  
2 A. That's what it states.  
3 Q. And I gather this is Miss Massey's  
4 replacement?  
5 A. My understanding, yes.  
6 Q. And the report is also addressed to you, Cody  
7 Whittington at Max Specialty.  
8 A. That's correct.  
9 Q. Again, the format is pretty much the same. He  
10 has the term "Estimate." Do you see that?  
11 A. Yes.  
12 Q. Do you know why Mr. Cruikshank is issuing a  
13 report only 16 days after his November 3rd report?  
14 A. Apparently he has information here which he  
15 wishes both companies to be aware of.  
16 Q. And what information is that?  
17 A. Apparently the salvage contract for removal of  
18 the wreck removal. Also reflects valuations.  
19 Q. Okay. But once again, I note that he's got  
20 the subcategory of "Estimate" --  
21 A. Yes.  
22 Q. -- which you've indicated to me are his  
23 estimate of damages for the covered items under the  
24 property program.  
25 A. Yes.

212  
1 whether it was debris removal or wreck removal.  
2 Q. Up to this point in time, had you reviewed the  
3 Westchester primary policy?  
4 A. Yes.  
5 Q. And after reviewing that policy, did that  
6 trigger any questions in your mind whether the property  
7 program did insure debris removal for the drydock?  
8 A. Being that I am not familiar with the MGL's  
9 policy, how could I compare it to see any difference,  
10 any problem?  
11 Q. I'm not asking whether you saw the MGL.  
12 I'm asking in regards to your own policy, that  
13 is, the Ace/Westchester primary and the Max Specialty  
14 excess, was there anything in those policies that  
15 indicated to you that debris removal for this drydock  
16 was not covered under the property program?  
17 A. Debris removal is afforded. There's no  
18 indication it's afforded for removal of drydock.  
19 Q. When you say "debris removal is afforded,"  
20 what do you mean?  
21 A. It is available coverage for the policy and  
22 under the policy.  
23 Q. For the policy and under the policy?  
24 A. Yes.  
25 Q. For --

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

213

1 A. It was provided under the policy.  
 2 Q. For all insured property.  
 3 A. Yes.  
 4 Q. And the drydocks were insured property under  
   the property program.  
 5 A. Yes.  
 6 Q. By extension and using your own statements,  
   you at this point believed that there was debris removal  
   coverage for the drydock; is that correct?  
 7 A. That is not correct.  
 8 Q. You had objection to that coverage?  
 9 A. I did not have any objections to the coverage.  
 10 I did not know it was, it was or was not covered under  
   debris removal.  
 11 Q. I see.  
 12 A. I believe that's why we, we sent it to  
   Mr. Minx --  
 13 Q. Well --  
 14 A. -- for review and his opinion.  
 15 Q. Before the Ace representative or  
 16 Mr. Cruikshank on his own raised the question of whether  
   the debris removal was covered under the property  
   program, did you have any questions in your mind that it  
   was covered --  
 17 A. No.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

1 coverage is there or not?  
 2 A. In Mr. Cruikshank's report?  
 3 Q. No. Your, your job.  
 4 A. In Mr. Cruikshank's report? Stated in  
   Mr. Cruikshank's report?  
 5 Q. Aren't you supposed to review it, and if you  
   disagree, you send -- don't you send him something  
   saying, "I object. You're wrong"?  
 6 A. No. At this time it's Ace/Westchester's  
   exposure under the policy.  
 7 Q. So even though you read the policy and you see  
   nothing in the policy that would exclude coverage for  
   the debris removal, is it your testimony that you just  
   didn't question it because you didn't think you were  
   exposed?  
 8 A. My exposure begins when Ace/Westchester  
   exhausts their limits. Until that time,  
   Ace/Westchester's making the decision on their own  
   coverages.  
 9 Apparently they noticed or discovered or  
 10 questioned the coverage on debris removal.  
 11 Q. Okay. Did Mr. Cruikshank or  
 12 Ace/Westchester -- strike that. You only spoke to  
 13 Mr. Cruikshank on this issue.  
 14 Did Mr. Cruikshank ever tell you what in his

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

214

1 Q. -- or not covered?  
 2 A. No.  
 3 Q. Okay. So you believed it was covered.  
 4 A. Until otherwise advised, yes.  
 5 Q. Okay. I'm asking you, though, did you see  
   anything in the policy, whether it be the Ace primary or  
   the Max Specialty excess, that raised any doubts in your  
   mind that debris removal was not covered?  
 6 A. In my mind, no.  
 7 Q. Okay.  
 8 A. Ace/Westchester, Mr. Cruikshank, apparently  
   did.  
 9 Q. Well, it's either Mr. -- it could be  
 10 Mr. Cruikshank on his own, correct?  
 11 A. I don't know.  
 12 Q. You don't know.  
 13 But we know Mr. Cruikshank raised the issue.  
 14 A. The issue was raised. By who is the question.  
 15 Q. Okay. So am I correct in my understanding  
   when you read the Ace/Westchester policy and  
   Max Specialty excess policy literally, just using the  
   words, you believed there was coverage for debris  
   removal for this drydock under the property program.  
 16 A. I had no indication that it would not be.  
 17 Q. Well, isn't it your job to state whether the

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

1 mind raised the question about coverage for debris  
   removal under the property program?  
 2 A. No. My thought is he brought that up with  
   Ace/Westchester.  
 3 Q. So you don't know the reason.  
 4 A. No.  
 5 Q. Okay.  
 6 A. I was not privy to their communications other  
   than Mr. Cruikshank's report.  
 7 Q. Okay.  
 8 Now, does there come a time when you receive  
   information from Mr. Cruikshank or the Minx office which  
   advises you that the coverage, that the coverage may not  
   be under the Ace property program?  
 9 A. Yes.  
 10 Q. Okay. Can you tell me what Minx told you --  
   first of all, did you agree with Mr. Minx's analysis?  
 11 A. Mr. Minx's analysis I believe was, was  
   forwarded to Ace/Westchester and not us until later.  
 12 Q. Okay.  
 13 A. I agree with Mr. Minx.  
 14 Q. When you say you agree with Mr. Minx, did you  
   agree with Mr. Minx before you saw his opinion in  
   writing?  
 15 A. I believe he communicated by email the

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

217

1 summation of his report before I saw his report.  
 2 Q. Did you ever see his full report?  
 3 A. At this time? I believe I did. I might be  
 4 mistaken.  
 5 Q. Okay. What in Mr. Minx's report caused you to  
 6 come to the understanding that there was no coverage for  
 7 the debris removal under the Ace property program for  
 8 this drydock?  
 9 A. Rephrase your question. I'm sorry.  
 10 Q. Well, you said you agreed with Mr. Minx's  
 11 opinion.  
 12 A. Right.  
 13 Q. What was Mr. Minx's opinion?  
 14 A. Do we have a copy of his opinion?  
 15 Q. Well, I'm entitled to exhaust your memory.  
 16 A. Right.  
 17 Q. Do you recall what Mr. Minx said?  
 18 A. In a few words, he indicated that the debris  
 19 removal coverage under the property policy would not  
 20 apply to this loss.  
 21 Q. Okay.  
 22 A. That the wreck removal coverage under the MGL  
 23 policy was specifically for this incident.  
 24 Q. All right. What did Mr. -- what was --  
 25 A. That is my summation.

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

219

1 You're not permitted to point your pen at certain  
 2 sections and instruct your witness on how to  
 3 answer.  
 4 Please close the document or go down to the  
 5 end of the table and review it.  
 6 MR. BOWLES: Objection.  
 7 MR. NICOLETTI: You're going to tell me,  
 8 you're going to bold-face lie to me and tell me you  
 9 didn't have your pen pointed to certain sections on  
 10 that page?  
 11 MR. BOWLES: I pointed to the fact that they  
 12 are enclosing --  
 13 MR. NICOLETTI: You shouldn't be pointing to  
 14 anything.  
 15 MR. BOWLES: Objection. I'm trying to find  
 16 out this is Donato Minx' opinion attached to this,  
 17 and it says --  
 18 MR. NICOLETTI: Wait a minute. I don't need a  
 19 speaking objection.  
 20 Mr. Whittington, please leave the room while  
 21 we have this discussion.  
 22 That's the appropriate way to do it.  
 23 THE DEPONENT: Is that okay?  
 24 MR. BOWLES: Go ahead.  
 25 I'm trying to find out what's attached to this

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

218  
 1 Q. What was the grounds or basis for Mr. Minx  
 2 saying that debris removal for this drydock is not  
 3 available under the property program?  
 4 A. We would have to go back to his, his opinion  
 5 and read it.  
 6 Q. Well, I'm asking you from your recollection.  
 7 A. I just stated it.  
 8 Q. Well, you gave me a general answer. I'm  
 9 delving into it.  
 10 I'm asking you what was the factual or legal  
 11 basis that Mr. Minx utilized as the foundation for his  
 12 opinion that debris removal coverage was not available  
 13 for the drydock under the property program?  
 14 A. Due to the specific nature, I'd have to review  
 15 his letter and comment further.  
 16 Q. Okay. Let's see if we can find that. I'm  
 17 certain we can.  
 18 MR. NICOLETTI: Let's have this next document  
 19 marked as 217, Whittington 217. It is a York  
 20 document dated December 9, 2009.  
 21 There are no production control numbers on it.  
 22 (York Report Number Five was marked Deposition  
 23 Exhibit Number 217.)  
 24 MR. NICOLETTI: Mr. Bowles, you're not --  
 25 you're permitted to review the exhibit as marked.

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

220

1 document.  
 2 (The witness withdrew from the room.)  
 3 MR. BOWLES: I'm surprised that you have the  
 4 Donato Minx opinion.  
 5 MR. NICOLETTI: Hey, I'm not the one -- you  
 6 guys produced everything.  
 7 MR. BOWLES: Well --  
 8 MR. NOVAK: You produced it a half a year ago.  
 9 MR. NICOLETTI: And this -- and to the extent  
 10 that it's in this document, this is one of their  
 11 reports.  
 12 MR. BOWLES: All right.  
 13 MR. BLAND: What happened? I almost got run  
 14 over by the witness.  
 15 MR. NICOLETTI: Mr. Bowles was prompting his  
 16 witness --  
 17 MR. BOWLES: Objection.  
 18 MR. NICOLETTI: -- by pointing to certain  
 19 sections of the document that I just marked as an  
 20 exhibit.  
 21 MR. BOWLES: Objection.  
 22 MR. BLAND: Are we on break for a moment?  
 23 MR. NICOLETTI: Are we finished?  
 24 MR. BOWLES: Let me take a break.  
 25 MR. NICOLETTI: Please do not speak to your

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

221

witness.

MR. BOWLES: I'm not going to speak with the witness.

Do you want to come with me? I have to go to the bathroom.

MR. NICOLETTI: No, that's too ugly of a thought.

(A recess was taken from 5:02 p.m. until 5:06 p.m.)

BY MR. NICOLETTI:

Q. All right, Mr. Whittington. Let's go back on the record.

Let me show you what has been marked as Whittington Exhibit 217. This is York's -- Mr. Cruikshank from York's fifth report; is that correct?

A. That's correct, December 9, 2009.

Q. Excuse me? Yes, December 9, 2009.

It's addressed to Mr. Cocker and to yourself; is that correct?

A. That's correct.

Q. And under "Estimate," this time -- the first item remains the same, Port Arthur drydock, 13.6 million, but the category for debris removal has been deleted.

not covered under the property program is set forth under the subcategory "Debris Removal"?

A. That appears to be his summation opine, opinion.

Q. His summation or his opinion?

I believe that's his full opinion on that issue, isn't it?

A. If you want to mince words, yes.

Q. I'm not mincing words, because he does have an executive summary up front.

A. He does.

Q. Right.

But the basis of that summary or the foundation is the three paragraphs that appear under the heading "Debris Removal."

A. Are you asking me yes?

Q. I'm asking, is that yes?

A. Yes.

Q. Okay.

Now, can you tell me in your own words the basis of Mr. Minx's belief that debris removal of this drydock is not insured under the property program?

A. I can read you his opinion, which I agree with.

Q. I understand you agree with his opinion.

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

222

A. Yes.

Q. Am I correct in my understanding that the sole basis for deleting the debris removal from coverage, from the available coverages under the property program is the opinion provided to the property underwriters by Brook Minx of Donato Minx?

A. That's correct.

Q. Other than this opinion, does Max Specialty have any other basis for alleging that debris removal for the drydock is not a covered under the property program?

A. Any other evidence?

Q. Any other reasons or evidence.

A. No.

Q. Let me direct your attention -- unfortunately, this document is not numbered, but if you go from the back, third page from the end, you see that?

A. What's the -- "Compulsory Wreck Removal"?

Q. It says "Debris Removal."

A. "Debris Removal."

Q. Do you see it?

A. Yes.

Q. Okay. Am I correct in my understanding -- and please review the entire document -- the sole basis for Mr. Minx's belief that debris removal for the drydock is

I'm asking if you can put it in your own words the basis for your agreement with Mr. Minx's opinion or is it limited just to what Mr. Minx stated?

A. Yes, it's limited to what Mr. Minx's opinion after review with Ace/Westchester and us, Max Specialty.

Q. I'm sorry. Say that again?

MR. NICOLETTI: Can you read his answer back -- it got kind of garbled on the end -- for me?

THE DEPONENT: In summation, Ace/Westchester, Max Specialty agrees to his opinion.

BY MR. NICOLETTI:

Q. Okay. How do you know Ace agrees?

A. By your own documentation and question, they did not do anything to refute his statement.

Q. Did you have any conversations with anyone at Ace/Westchester where they told you they agreed with Mr. Minx's opinion?

A. I never had any conversations with Ace/Westchester in their agreement or disagreement.

Q. So you really don't know what Ace/Westchester's position is, do you, with regard to Mr. Minx's opinion?

A. I would imagine if they disagree, they would have stated so, and Mr. Cruikshank would have repeated

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

229

1 A. Under the Max Specialty policy, yes.  
 2 Q. Right.  
 3 A. Right.  
 4 Q. And under the Ace policy also?  
 5 A. The Ace policy is separate. It is a follow  
 6 form, but at that point what Ace was doing, potentially  
 7 going to pay or reject debris removal coverage was their  
 8 decision.  
 9 So I'm waiting at that time for what Ace wants  
 10 to do.  
 11 Q. I'm a little -- I have to back up here.  
 12 A. I think you should.  
 13 Q. Is -- thank you.  
 14 Is the Minx opinion relative only to the  
 15 Max Specialty policy?  
 16 A. I believe Mr. Minx's opinion is, is relative  
 17 to both the Ace/Westchester and Max policy.  
 18 Q. Okay. That's -- I want to make that clear.  
 19 A. All right.  
 20 Q. All right. Prior to the issue coming -- prior  
 21 to receiving the Minx opinion, is it your testimony you  
 22 never questioned the coverages?  
 23 A. At that time, no, I did not.  
 24 MR. NICOLETTI: Let's have this document  
 25 marked as Whittington Exhibit 218 for

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

231

1 a diary system.  
 2 A. No.  
 3 Q. Yes, it's an email.  
 4 A. It's an email. It's a series of emails.  
 5 Q. And it says -- this is an email, the second  
 6 from the top, from Cody Whittington to Cruikshank, and  
 7 it states -- the re is "AFDB-5 drydock," and it states,  
 8 "You have assigned counsel per my email of 10/22/2009,"  
 9 question mark.  
 10 A. Yeah.  
 11 Q. Does that refresh your recollection -- read  
 12 that to yourself, if you wish.  
 13 Does that refresh your recollection that  
 14 you're the one who raised the issue of the available  
 15 coverages?  
 16 A. No.  
 17 Q. Then why are you following up?  
 18 A. Because, one, I believe I was wondering  
 19 where -- oh, this was in response to Preis & Roy.  
 20 Let me read this, please (reviewing the  
 21 document).  
 22 Q. Please do.  
 23 A. Okay. What's the question again, please, sir?  
 24 Q. I just want to know if that refreshes your  
 25 recollection that you were the person who raised the

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

230

1 identification. It's a two-page document bearing  
 2 production control numbers MSI 00453 and 454.  
 3 (Email Chain dated October 26, 2009 from  
 4 Cruikshank to Whittington was marked Deposition Exhibit  
 5 Number 218.)  
 6 BY MR. NICOLETTI:  
 7 Q. It says here under -- strike that.  
 8 Can you identify the document first? This is  
 9 Exhibit 218. If you can.  
 10 A. It's a series of emails --  
 11 Q. What is the document, though? Is that part of  
 12 your log or diary system?  
 13 A. It's an email to me where apparently it's a  
 14 series of emails that was placed in our file as an  
 15 attachment.  
 16 Is that what you were looking for?  
 17 Q. I just wanted you to identify the document.  
 18 That's not part of your regular diary that  
 19 lists all the emails?  
 20 A. No. This is an email.  
 21 I haven't read it yet. Do --  
 22 Q. No, I have to look at it again.  
 23 A. Okay.  
 24 Q. I just wanted you to identify it.  
 25 So this is just an email. This is not part of

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

232

1 issue concerning the available coverages for debris  
 2 removal for the drydock under the Signal property --  
 3 A. It does not say that.  
 4 It states -- I asked Mr. Cruikshank did he  
 5 assign counsel per my email of 10/20/2009.  
 6 The question was is counsel assigned to  
 7 respond to -- Preis & Roy?  
 8 Q. Price Roy (phonetic).  
 9 A. Preis Roy.  
 10 -- and their communication which was attached  
 11 and sent to Mr. Cruikshank, too.  
 12 Q. That's all.  
 13 My question was, does that refresh your  
 14 recollection? I guess it doesn't refresh your  
 15 recollection that you may have been more involved with  
 16 the opening question -- opening the questioning on the  
 17 available coverages for debris removal.  
 18 A. Well, I'm sure you're going to disprove me if  
 19 I say yes, so let's wait.  
 20 Q. The question is, as you sit here today, do you  
 21 recall bringing the issue up yourself in the first  
 22 instance?  
 23 A. No. I believe, to the best of my knowledge at  
 24 this time, that I was asked by Cruikshank if I wanted to  
 25 assign Minx, and I don't think I ever responded, but I'm

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

241

1 A. Then why did we go over it?  
 2 Q. Because I like to know your understanding.  
 3 A. Oh. But the document speaks for itself.  
 4 MR. NICOLETTI: Let's have this next document  
 5 marked as Whittington Exhibit 220. It is a  
 6 document entitled "Affidavit of Cody Whittington in  
 7 Support of Defendant Max Specialty's Motion for  
 8 Continuance to Obtain Necessary Discovery."  
 9 (Affidavit of Cody Whittington was marked  
 10 Deposition Exhibit Number 220.)  
 11 BY MR. NICOLETTI:  
 12 Q. By the way, Mr. Whittington, in preparation  
 13 for this deposition, did you review this document with  
 14 your attorney, Mr. Bowles?  
 15 A. I remember reviewing this document in  
 16 preparation, submission. With Mr. Bowles, no.  
 17 Q. Can you say that again?  
 18 MR. NICOLETTI: Can you read that back to me  
 19 because that didn't make --  
 20 THE DEPONENT: When Mr. Bowles prepared this,  
 21 I read it then.  
 22 BY MR. NICOLETTI:  
 23 Q. Okay.  
 24 A. But after that, I haven't read it with  
 25 Mr. Bowles of recent.

1 They were submitted by other parties in the claim.  
 2 Isn't this -- oh, I'm sorry.  
 3 Q. This is your affidavit. This is not  
 4 interrogatories.  
 5 A. I'm sorry.  
 6 Q. Okay.  
 7 A. I'm sorry.  
 8 Q. So my question to you is, did you draft this  
 9 document yourself?  
 10 A. No, I did not.  
 11 Q. Okay.  
 12 A. I gave him the information to draft the  
 13 document.  
 14 Q. My question is, how did you -- how did it come  
 15 about that you knew what information to give to  
 16 Mr. Bowles that went into this affidavit?  
 17 A. How did it come about that I knew the  
 18 information?  
 19 Q. Right.  
 20 A. I assume from the contents of my file.  
 21 Q. No, my question to you is, did Mr. Bowles come  
 22 to you and say, "These are the questions I need answers  
 23 to put into your affidavit?" or did you propose to him  
 24 the drafts that he put into this affidavit?  
 25 A. No, he proposed the drafts.

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

242

1 Q. And I really think you've answered my first  
 2 question, that is, did you draft this document?  
 3 A. Well, actually, Mr. Bowles drafted this  
 4 document. I provided the information in answers to  
 5 these questions and then made review and corrections.  
 6 Q. Do you have any drafts of this affidavit?  
 7 A. I don't believe I have any drafts of it.  
 8 Q. I thought you indicated you received things  
 9 back from Mr. Bowles and marked it up and sent it back  
 10 to him.  
 11 A. Physically marking it up, no. Electronically  
 12 sending it back to him with my written comments, yes.  
 13 Q. Let me see if I can understand the process  
 14 here.  
 15 Mr. Bowles asked you a series of questions,  
 16 you answered those questions, and that's how he prepared  
 17 the affidavit for you?  
 18 A. Mr. Bowles sent me copy of the questions,  
 19 asked me for my answers. I gave him in response my  
 20 information. He prepared the documents, and I reviewed  
 21 it further or replied to him whether it was correct or  
 22 not.  
 23 Q. So what came first, Mr. Bowles' questions to  
 24 you?  
 25 A. I believe Mr. Bowles forwarded questions.

1 Q. All right.  
 2 Well, that's what I'm getting to.  
 3 A. Okay.  
 4 Q. Did he ask you questions that you answered --  
 5 A. Yes.  
 6 Q. -- or did he present a draft to you for your  
 7 review?  
 8 A. No. He asked me questions.  
 9 Q. Okay. And what questions did he ask you?  
 10 A. Assuming that the answers to his are stated in  
 11 this affidavit -- shall we read each one?  
 12 Q. Well, I guess we can go paragraph by  
 13 paragraph.  
 14 A. All right.  
 15 Q. It says here in paragraph -- it says --  
 16 paragraph 4 says, "After Signal's floating drydock, the  
 17 AFDB-5, sank in Port Arthur, Texas in August 2009, I  
 18 received and reviewed copies of the primary and excess  
 19 marine general liability insurance policies (MGL) issued  
 20 by plaintiffs to Signal."  
 21 When did you get those policies?  
 22 A. Those policies I believe were submitted to  
 23 Mr. Cruikshank.  
 24 Let's start over.  
 25 Q. Did you ever receive actual physical copies of

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

245

1 both the primary marine general liability policy and the  
 2 marine excess liability policy?  
 3       A. Is that the one term "Bumbershoot"?  
 4       Q. Yes.  
 5       A. Yes.  
 6       Q. And how did they come to you?  
 7       A. From vague memory, and I might be incorrect,  
 8 but I believe Willis provided those copies to  
 9 Cruikshank. Cruikshank provided it to us. I'm not  
 10 sure, though.  
 11      Q. So --  
 12      A. Or Willis sent them direct to us. I'm not  
 13 sure.  
 14      Q. Now, paragraph 5, you quote from a particular  
 15 part of the policy. You see that?  
 16      A. Yes.  
 17      Q. Who selected the excerpts from the endorsement  
 18 to be put in your affidavit?  
 19      A. My counsel.  
 20      Q. Okay. So in other words, you had nothing to  
 21 do with leaving out the pollution exclusion which is  
 22 contained within that endorsement, did you?  
 23      A. No, I did not.  
 24      Q. Did you ever read the entire endorsement and  
 25 discuss with Mr. Bowles whether some additional language

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

1 A. Sure.  
 2 Q. Do you know why the pollution exclusion in the  
 3 marine liability endorsement was not included as part of  
 4 paragraph 5?  
 5       A. I do not.  
 6       Q. Are you aware that the Texas GLO order was  
 7 issued under Chapter 40 which is the pollution  
 8 section --  
 9           MR. GALATI: Objection to form.  
 10 BY MR. NICOLETTI:  
 11      Q. -- of the statute?  
 12      Are you aware of that?  
 13      A. At this time, no.  
 14      Q. Were you aware of it then?  
 15      A. Possibly, yes.  
 16      Q. And if the order arises out of a pollution  
 17 incident, would it not be important to advise the judge  
 18 that there was a pollution exclusion contained in the  
 19 endorsement?  
 20           MR. GALATI: Objection form, foundation.  
 21           Can I have a continuing objection on your  
 22 reference to the statute?  
 23           MR. NICOLETTI: Yes.  
 24           MR. GALATI: Thank you.  
 25           MR. NICOLETTI: That's fine. We'll get to you

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

246

1 should be put into this --  
 2       A. No.  
 3       Q. -- affidavit from that endorsement?  
 4       A. No.  
 5       Q. So in other words, you permitted your counsel  
 6 to excerpt the document, and you just adopted it; is  
 7 that correct?  
 8       A. I believe that's what I employ the counsel  
 9 for.  
 10      Q. So you employ your counsel to write your  
 11 affidavits and to select, and to select the material to  
 12 go into it?  
 13      MR. BOWLES: Objection.  
 14 BY MR. NICOLETTI:  
 15      Q. Is that correct?  
 16      A. Rephrase the question.  
 17      Q. Did you employ your counsel to draft this  
 18 affidavit in the form he wished and then you just signed  
 19 off on it?  
 20      A. No.  
 21      Q. Okay. Is there --  
 22      A. He prepared the document, I believe is what I  
 23 was trying to answer.  
 24      Q. My point is, I'm trying to see how much input  
 25 you had in the preparation.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

248  
 1 next.  
 2 BY MR. NICOLETTI:  
 3       Q. Anyway...  
 4       A. Oh, I'm supposed to answer you?  
 5       Q. Yes.  
 6       A. Can you tell me your question again?  
 7       Q. Very simply, if the Texas GLO order was issued  
 8 under a pollution statute, would it not be appropriate  
 9 to advise the judge that the endorsement that you're  
 10 citing also has a pollution exclusion?  
 11           MR. BOWLES: Objection.  
 12           THE DEPONENT: That I would feel is beyond my  
 13 scope, and that is why I retained counsel to advise  
 14 me further.  
 15 BY MR. NICOLETTI:  
 16      Q. So if it is relevant, your counsel left it  
 17 out, you blame your counsel, not yourself; is that  
 18 correct?  
 19      A. At this time I'm not blaming anyone.  
 20      Q. All right. We'll move on.  
 21           THE DEPONENT: Everybody makes comments, but I  
 22 don't hear them.  
 23           What did you say?  
 24           MR. NICOLETTI: I didn't --  
 25           THE DEPONENT: Wait a minute. Why are you

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

249

1 allowed to make comments and I can't?  
 2 MR. NICOLETTI: You can. We'll put all your  
 3 comments on the record. I have no problem.  
 4 THE DEPONENT: I'd like to hear his comment,  
 5 if I could.  
 6 Did you hear it?  
 7 THE COURT REPORTER: I did not hear it.  
 8 THE DEPONENT: Why can't it be heard?  
 9 BY MR. NICOLETTI:  
 10 Q. Mr. Whittington, since I only have a limited  
 11 amount of time...  
 12 A. I do.  
 13 Q. Thank you.  
 14 Item 6 says, "The excess marine general  
 15 liability insurance policy refers to and incorporates  
 16 Insurance Form SP23."  
 17 Do you know what Form SP23 is?  
 18 A. No, sir.  
 19 Q. What?  
 20 A. No, sir.  
 21 Q. Well, if you don't know what's in it, how do  
 22 you then swear which -- in the same affidavit which  
 23 contains coverage language identical to that in the  
 24 primary MGL policy quoted above?  
 25 A. Counsel advises me of this.

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

251

1 Q. Were you aware at the time you signed the  
 2 affidavit?  
 3 A. Yes, I believe I was.  
 4 Q. All right. Then when you state here that  
 5 Form SP23 -- I'm sorry, when you state in paragraph 6  
 6 that -- I'll quote the entire paragraph -- "The excess  
 7 MGL insurance policy refers to and incorporates  
 8 insurance Form SP23 marine general liability insurance  
 9 form, which contains coverage language identical to that  
 10 in the primary MGL policy quoted above," that's not an  
 11 accurate statement because you've already told me that  
 12 you don't know what Form SP23 is, isn't that true?  
 13 A. That is correct.  
 14 Q. So you have an inaccurate statement in your  
 15 affidavit.  
 16 A. Is this statement inaccurate if my counsel has  
 17 advised me of this?  
 18 Q. Well, what happens if your counsel's wrong?  
 19 A. Then that's an issue I take up with my  
 20 counsel.  
 21 Q. And if your counsel is wrong, then this  
 22 statement is incorrect, isn't that true?  
 23 A. That is correct.  
 24 Q. Okay. Do you know that the Form SP23 is not a  
 25 general liability form; that, in fact, it's a very

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

250

1 Q. You swear to anything your counsel tells you.  
 2 MR. BOWLES: Objection.  
 3 THE WITNESS: I don't believe my counsel lies  
 4 to me or provides me inaccurate information.  
 5 BY MR. NICOLETTI:  
 6 Q. I note that you -- when you, when you made  
 7 this affidavit to Judge Kaplan, you said, "Cody  
 8 Whittington, being duly sworn, deposes and says."  
 9 Nowhere in that line do you say "Upon  
 10 information and belief," do you? At the very beginning.  
 11 A. At the very beginning.  
 12 Q. You say, "Cody Whittington, being duly sworn,  
 13 deposes and says." That's all you say in the opening,  
 14 isn't that correct?  
 15 A. Yes.  
 16 Q. You don't add "Upon information and belief,"  
 17 do you?  
 18 A. It does not state that, no.  
 19 Q. Do you understand when you make statements  
 20 such as "Cody Whittington, being duly sworn, deposes and  
 21 says," without the qualification "Upon information and  
 22 belief," you're actually telling the judge under oath  
 23 that you know these facts as set forth in this affidavit  
 24 of your own personal knowledge? Are you aware of that?  
 25 A. Yes, I am now.

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

252

1 specific protection and indemnity form? Did you know  
 2 that?  
 3 A. No, I did not.  
 4 Q. Your counsel's a very experienced marine  
 5 attorney.  
 6 Did you expect him to know the difference?  
 7 A. I expect him, yes.  
 8 Should I be reading this document, too?  
 9 Q. When I get to a point I want to ask you a  
 10 question, yes, I'll direct your attention.  
 11 A. Okay.  
 12 Q. Is there anything in this document, your  
 13 affidavit, where you advise the court that for the first  
 14 four months of the claim, there was a belief by the  
 15 property underwriters that debris removal was available  
 16 for coverage under the property program?  
 17 A. I don't believe anything is in this document  
 18 that states that.  
 19 Q. Is there anything in this document that tells  
 20 the court that at some time after receiving the  
 21 attorney's opinion, that the property underwriter  
 22 Max Specialty altered its position?  
 23 A. Did we alter? I don't believe we altered our  
 24 position.  
 25 Q. Well, came out and then said there was no

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

1 coverage after accepting five -- four reports where  
 2 coverage was reflected?

3 A. I believe --

4 Q. Strike that. Let's go one step at a time.

5 In paragraph 12, you say -- read paragraph 12.  
 6 "The debris removal provision in the primary property  
 7 insurance policy issued by Westchester is intended to  
 8 insure Signal for the costs of removing debris if, for  
 9 example, a building on land is damaged as a result of a  
 10 storm or other occurrence."

11 Where is that specific language in the  
 12 Westchester policy limiting debris removal to buildings?

13 A. There is no statement in the Westchester  
 14 policy that states this.

15 Q. I thought you said you don't go for intent.  
 16 You go for policy language.

17 Didn't you just tell me that in an answer  
 18 about 20 minutes ago?

19 A. I assume so.

20 Q. All right. Where do you come to the  
 21 understanding that the Westchester policy is intended to  
 22 insure Signal for debris removal of buildings only?  
 23 Where do you derive Westchester's intent if there's  
 24 nothing in the policy so limiting it?

25 A. Recommendations of two counsel.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

1 Q. So you base your reliance on counsel based on  
 2 them not telling you anything?

3 A. No, I base my decisions from counsel on what  
 4 they tell me.

5 Q. All right. Where in the Minx -- did you have  
 6 any telephone conversation with Mr. Minx?

7 A. No.

8 Q. Did you have any other communications with  
 9 Mr. Minx other than receiving his opinion in writing?

10 A. Yes.

11 Q. What other communications?

12 A. Emails.

13 Q. Okay. And in those emails, did he ever tell  
 14 you that there was specific language in the Westchester  
 15 policy which limited debris removal to land-based  
 16 covered property?

17 A. No.

18 Q. Is there anything in the policy -- I will now  
 19 hand you the policy -- where it states that the debris  
 20 removal coverage is limited solely to land-based covered  
 21 property?

22 A. There is none.

23 Q. Okay. I thought you wanted to see the policy.  
 24 You just asked me for it.

25 A. I did.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

254

1 Q. Which two counsels?

2 A. Minx, Larry.

3 Q. Where does Mr. Minx say in his opinion that  
 4 the Westchester policy is only intended to cover debris  
 5 removal for buildings?

6 A. Do you have a copy of the policy?

7 Q. Policy or the opinion?

8 A. I don't need the opinion. I need the policy  
 9 which you state.

10 Q. No, no. You told me that based upon --

11 A. Yeah, and I know how to ask for documents to  
 12 refer to.

13 Q. Not till you answer my question.

14 You have just stated under oath that the basis  
 15 for your saying that the Westchester policy was intended  
 16 to insure Signal for the cost of removing debris if, for  
 17 example, a building on land is damaged was based upon  
 18 the opinion of your two counsel --

19 A. Yes.

20 Q. -- Mr. Minx and Mr. Bowles.

21 A. That's correct.

22 Q. Okay. Where in Mr. Minx's opinion does he so  
 23 state that limitation?

24 A. I don't believe he states it in his, his  
 25 opinion, but then again, it doesn't say that it isn't.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

255

1 Q. Okay. But you didn't even look at the first  
 2 page.

3 A. The way you rephrased your question, I could  
 4 answer you then.

5 Q. Thank you for helping me.

6 A. That's what I'm here for.

7 Q. So the sole basis for your statement in your  
 8 sworn affidavit that debris removal is limited to  
 9 land-based covered property is based upon your counsel's  
 10 opinion, Mr. Minx and Mr. Bowles.

11 A. And my agreement.

12 Q. I understand you agree with it.

13 But what's your independent basis, other than  
 14 your counsels telling you so, that the Signal -- that  
 15 the Westchester primary property policy, debris removal  
 16 coverage is limited to land-based covered property?

17 A. It is their opinion based on, I assume, their  
 18 legal research.

19 Q. Did you see their legal research?

20 A. No. I did not ask for it either.

21 Q. I didn't ask you if you asked for it. I said  
 22 did you see it?

23 A. I'm just helping you along.

24 Q. So you didn't see it.

25 A. No, sir.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

257

1 Q. Okay. Did they ever tell you they did legal  
2 research?  
3 A. I assume they did legal research.  
4 Mr. Minx's letter cites case law.  
5 Q. That's right, cites two cases.  
6 A. Yes.  
7 Q. One of which actually supports the proposition  
8 that debris removal is covered under the property  
9 policy, doesn't it?  
10 A. I'm not sure if it does.  
11 Q. Well, wasn't there a cargo policy, which is  
12 property policy, where the court found that the debris  
13 removal did extend to removing the cargo from the sunken  
14 ship?  
15 A. I can't remember that opinion in his letter.  
16 Q. We can get back to it.  
17 A. I'm here for the rest of the night.  
18 Q. Thank you.  
19 At any time did either Willis or behalf of  
20 Signal or Signal itself request that Max Specialty  
21 recognize their allocation of \$5 million of the  
22 \$10 million primary payment to the debris removal of the  
23 sunken drydock?  
24 A. I believe they expressed their disagreement  
25 and that was their intent, yes.

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

259

1 The point is, you never tell the Court that  
2 the insured itself had changed its mind and wanted  
3 \$5 million of debris removal from the property program,  
4 isn't that true?  
5 A. I believe you're correct.  
6 Q. All right. Any reason why you didn't want to  
7 tell the Court the whole story and true story what was  
8 going on here?  
9 A. What is untrue about what I've stated?  
10 Q. Well, you're telling the court here Signal  
11 solely expected to get wreck removal from the MGL and  
12 the excess MGL.  
13 A. Again, I rely on my counsel to prepare answers  
14 to the court based on information I give them.  
15 Q. So you don't think it was necessary to tell  
16 Judge Kaplan the whole story as to how this claim was  
17 developed, is that your position?  
18 A. I rely on my counsel to make answers to the  
19 court.  
20 Q. So in other words, if your counsel violated  
21 some ethical rule to the court, the court should address  
22 it to him, not you; is that correct?  
23 A. I do not know if it's an ethical question or  
24 not. That is your learned field.  
25 Q. If Mr. Bowles has not followed the rules in

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

258

1 Q. So they specifically asked you to recognize  
2 their allocation of 5 million of the 10 million primary  
3 payment to debris removal.  
4 A. Yes.  
5 Q. Okay. Do you ever tell the Court in this  
6 affidavit that such a request was made?  
7 A. No.  
8 Q. The whole purpose of this affidavit was to  
9 persuade the court that there was no debris removal  
10 coverage under the property program, correct?  
11 A. Yes.  
12 Q. And, in fact, you actually make a big point  
13 about telling the judge that the insured itself was  
14 looking to the MGL policies to pay for wreck removal.  
15 A. Based on the statements from Willis, that's  
16 what they were doing.  
17 Q. Right.  
18 Yet, you did have in your file subsequent to  
19 those positions a request by Signal for them to allocate  
20 \$5 million of the primary \$10 million payment for debris  
21 removal.  
22 A. Yes.  
23 Q. Okay.  
24 A. There was a request.  
25 Q. Right.

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

260

1 providing the court with sworn testimony, do you blame  
2 Mr. Bowles or yourself?  
3 MR. BOWLES: Objection.  
4 THE DEFONENT: I blame us both.  
5 BY MR. NICOLETTI:  
6 Q. Now, this affidavit is dated October 1st,  
7 2010.  
8 A. Okay.  
9 Q. Isn't it true that as of February 2010, Signal  
10 made the request to Max Specialty to allow them to --  
11 no, to recognize \$5 million of the \$10 million primary  
12 payment by Ace as debris removal and they put a further  
13 request for further payment of \$5 million to Westchester  
14 for the actual physical loss to the drydock?  
15 A. I don't believe they made an additional  
16 demand. I believe Willis disagreed. There was a  
17 discussion afterward. But please provide.  
18 Q. Excuse me?  
19 A. Please provide.  
20 Q. In paragraph 18 of your affidavit, you state,  
21 "Signal and its broker, Willis, are the only entities of  
22 which I am aware which would have actual knowledge of,  
23 and the filings regarding, the express intent of the  
24 insurance program Willis arranged for Signal." Is that  
25 correct?

ZAHN COURT REPORTING  
NORFOLK 757.627.6554 RICHMOND 804.788.8899

261

1 A. Yes. I think it's "files regarding," not  
 2 "filings."  
 3 Q. I'm sorry, "files regarding."  
 4 Now, you had in your file --  
 5 MR. NICOLETTI: Let's have this marked as  
 6 Whittington Exhibit 221. It bears production  
 7 numbers MSI 001118 through and including MSI  
 8 001121.  
 9 (Email Chain dated February 5, 2010 from  
 10 Cruikshank to Whittington was marked Deposition Exhibit  
 11 Number 221.)  
 12 BY MR. NICOLETTI:  
 13 Q. Can you identify that document?  
 14 A. An email from Cruikshank, Ken Cruikshank to me  
 15 dated February 5, 2010.  
 16 Q. Let me direct your attention to the bottom  
 17 email appearing on that first page.  
 18 A. The first page from Lisa Spears?  
 19 Q. That's right.  
 20 It's addressed to Ken Cruikshank, is it not?  
 21 A. Yes.  
 22 Q. And you're a recipient of the emails above it,  
 23 so you, in fact, did receive a copy of this email on the  
 24 bottom, although it's not copied directly to you; is  
 25 that correct?

1 A. (Reviewing the document).  
 2 Question, please, again?  
 3 Q. In Miss Spears' email of February 3rd, 2010  
 4 which you received in February 2010, she says, "Signal  
 5 is using 5 million of the 10 million received towards  
 6 debris removal."  
 7 A. Yes.  
 8 Q. All right.  
 9 A. I'm sorry. Where was the February 10th email  
 10 you were --  
 11 Q. That was something else.  
 12 A. I'm sorry.  
 13 Q. So as of February 2010, Signal is  
 14 demonstrating its intent that debris removal for the  
 15 drydock is covered under the primary Ace policy, is it  
 16 not?  
 17 A. That is their, their intent, yes.  
 18 Q. That's right.  
 19 Yet, in your October 2010 sworn affidavit to  
 20 the judge, you never tell the judge of Signal's intent,  
 21 do you?  
 22 A. No.  
 23 MR. BOWLES: Objection.  
 24 BY MR. NICOLETTI:  
 25 Q. In fact, you actually tell the judge that

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

262  
 1 A. From... no, I only received this from Ken  
 2 Cruikshank.  
 3 Q. Well, that's what I'm saying. You did  
 4 ultimately receive it.  
 5 A. Yes.  
 6 Q. And you received it on or about February 12th,  
 7 2010.  
 8 A. Mine says February 5th, 2010.  
 9 Q. Okay. I'll take February 5th, 2010.  
 10 A. When is February 10th?  
 11 Q. That's the Spears' email.  
 12 A. Spears' email is February 3rd.  
 13 Q. Well, there's one above it on  
 14 February 10th also.  
 15 Okay.  
 16 A. I don't see it.  
 17 Q. I'm sorry. I have the wrong document.  
 18 In this email from Spears to Cruikshank which  
 19 you ultimately received, Miss Spears -- do you recognize  
 20 Miss Spears as working for Signal?  
 21 A. Yes.  
 22 Q. Okay. And in this email of February 3rd,  
 23 Miss Spears is advising that she wants to use 5 million  
 24 of the 10 million primary payment for debris removal,  
 25 does she not?

1 Signal has a different intent, don't you?  
 2 A. I believe they changed afterward, yes.  
 3 Q. After when?  
 4 A. February 3rd, 2010.  
 5 Q. And how do you know they changed after  
 6 February 10th (sic)?  
 7 A. I believe the, the contention that they could  
 8 allocate \$5 million for the debris removal out of a  
 9 total of 10 million was dropped. They proceeded to, to  
 10 make claim for the BI and the newly acquired property  
 11 claim.  
 12 Q. Do you have an email to that effect?  
 13 A. Should have been produced and you should have  
 14 it.  
 15 Q. Isn't it true that the reason Signal moved  
 16 into a different direction is that they received a  
 17 letter from -- or email from Mr. Cheglikov telling them  
 18 they weren't entitled to make that allocation?  
 19 A. Mr. Cheglikov did issue a letter to that  
 20 effect, yes.  
 21 Q. Right.  
 22 So they were forced to move into a different  
 23 direction because of a position Max took, isn't that  
 24 true?  
 25 A. Your use of the worse "forced."

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

265

1 Q. Compelled, coerced?  
 2 MR. BOWLES: Objection.  
 3 THE DEPONENT: Still, I don't agree to that.  
 4 BY MR. NICOLETTI:  
 5 Q. But in effect, they didn't change position  
 6 until after getting Mr. Cheglikov's letter telling them  
 7 they couldn't so allocate primary funds to debris  
 8 removal, isn't that correct?  
 9 A. Maybe they understood then that they could or  
 10 couldn't. I can't tell you what they did.  
 11 Q. All right.  
 12 A. They stopped making the claim, though.  
 13 Q. But the timing is this. Miss Spears requested  
 14 the allocation.  
 15 A. Right.  
 16 Q. Immediately thereafter, Mr. Cheglikov on  
 17 behalf of Max said they couldn't make the allocation.  
 18 A. Right.  
 19 Q. And that's when you believe they stopped  
 20 asking for the allocation.  
 21 A. That's correct.  
 22 MR. GALATI: Off the record for a second.  
 23 (Discussion held off the record.)  
 24 MR. NICOLETTI: Give me two minutes.  
 25

1 Q. And then you say you made corrections.  
 2 A. Yes.  
 3 Q. How did you make the corrections?  
 4 A. In what form or what...  
 5 Q. What form?  
 6 A. Replied to him either verbally or written by  
 7 email.  
 8 MR. NICOLETTI: Mr. Bowles, have you produced  
 9 those emails?  
 10 MR. BOWLES: Probably not.  
 11 MR. NICOLETTI: On what basis?  
 12 MR. BOWLES: Attorney-client privilege.  
 13 MR. NICOLETTI: I'd --  
 14 MR. BOWLES: We're working through a letter  
 15 for Signal. I believe that's privileged.  
 16 MR. NICOLETTI: But I think I'm entitled to  
 17 understand the change--  
 18 BY MR. NICOLETTI:  
 19 Q. What changes did you make to this letter?  
 20 A. I do not remember.  
 21 MR. NICOLETTI: I demand production of the  
 22 emails.  
 23 MR. BOWLES: I'll take it under advisement.  
 24 MR. NICOLETTI: Let me mark this next document  
 25 as Whittington 222. It bears production numbers

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

266

1 (Discussion held off the record.)  
 2 BY MR. NICOLETTI:  
 3 Q. Let me show you, Mr. Whittington, what has  
 4 been marked as Exhibit 158 during the Bullock  
 5 deposition. It's an Alterra letter dated November 29,  
 6 2010.  
 7 A. Is this Mr. Cheglikov's letter?  
 8 Q. The answer is I believe Mr. Cheglikov signed  
 9 it. Whether it's his letter may be a different story.  
 10 No, it's your letter.  
 11 A. Okay.  
 12 Q. That's your letter.  
 13 Did you draft this letter?  
 14 A. I assisted in the drafting of this letter,  
 15 yes, by counsel.  
 16 Q. All right. How did you assist? What input  
 17 did you have?  
 18 A. I'm sorry. What is your question again?  
 19 Q. How did you assist?  
 20 A. I believe I made corrections -- yeah, I  
 21 believe I made corrections after counsel drafted the  
 22 letter.  
 23 Q. Okay. So the initial draft comes from  
 24 Mr. Bowles; is that correct?  
 25 A. I believe so, yes, sir.

1 MSI 001203 including but not limited to MSI 001214.  
 2 (Email dated February 16, 2010 from Cheglikov  
 3 to Baker with attachment was marked Deposition Exhibit  
 4 Number 222.)  
 5 BY MR. NICOLETTI:  
 6 Q. By the way, when you say that Signal -- going  
 7 back to your affidavit quickly -- intended to have the  
 8 debris removal of the drydock covered under the MGL  
 9 and/or the excess MGL policies, where did you derive  
 10 that understanding?  
 11 A. I believe from Mr. Baker or Bullock's email.  
 12 Q. Any other source?  
 13 A. No.  
 14 Q. Okay.  
 15 A. Wait. Possibly it could be a Cruikshank  
 16 report, but I'm not familiar or do not remember at this  
 17 time.  
 18 Q. Well, if it is from a Cruikshank report --  
 19 have we marked all of his reports?  
 20 A. The reports that you've produced, you've  
 21 marked, yes.  
 22 Q. Yes.  
 23 But were there any further reports beyond six?  
 24 A. Yes, I believe there was. I'm not sure,  
 25 though.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

269

1 Q. So if there's only six reports, we've marked  
 2 them. If there's a seventh, it should be, should be in  
 3 your production somewhere?  
 4 A. If there is a seventh report, yes.  
 5 Q. Okay.  
 6 A. I'm not sure if there is a seventh report,  
 7 though, at this time.  
 8 Q. Please examine Exhibit 222.  
 9 Are you familiar with that letter?  
 10 A. Yes.  
 11 Q. Do you recall having seen that letter before?  
 12 A. Yes.  
 13 Q. Did you take any part in drafting that letter?  
 14 A. No.  
 15 Q. Is that something that was drafted by  
 16 Mr. Cheglikov?  
 17 A. I do not know, sir.  
 18 Q. All right. How does it come about that you've  
 19 been dealing all along with this claim and it's now  
 20 given back to Mr. -- Mr. Cheglikov is involved in any  
 21 way?  
 22 A. Mr. Cheglikov, being a marine manager, is more  
 23 familiar with your policy than I am. He was asked --  
 24 Q. I don't have any policy. You mean the --  
 25 A. I'm sorry. For the company that you

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

271

1 A. Yes.  
 2 Q. Was it Mr. Boesen's suggestion to get  
 3 Mr. Cheglikov involved?  
 4 A. Yes.  
 5 Q. And what was his understanding of  
 6 Mr. Cheglikov's past experience in marine insurance, if  
 7 any?  
 8 A. I can't speak for Mr. Boesen and  
 9 Mr. Cheglikov.  
 10 Q. All right. So is the basis of your answer  
 11 that Mr. Cheglikov was involved with writing this letter  
 12 because he was more familiar with MGL policies based on  
 13 the fact that you knew nothing about MGL policies?  
 14 A. At that time, yes.  
 15 Q. Okay. Do you know anything --  
 16 A. And he had also attended the meeting you had  
 17 scheduled in New York.  
 18 Q. Do you think you have -- do you now have a  
 19 better understanding of MGL policies than you did when  
 20 you wrote your affidavit?  
 21 A. I do not have any interest in MGL policies to  
 22 make a study of it.  
 23 Q. So you've never made a study of the MGL  
 24 policy; is that correct?  
 25 A. I've read the MGL policy several times, but

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

270

1 represent.  
 2 He was asked to, to be involved concerning the  
 3 MGL policy.  
 4 Q. What is your understanding -- where did you  
 5 get the understanding that Mr. Cheglikov is more  
 6 familiar with the MGL policy?  
 7 A. Than me?  
 8 Q. Yes.  
 9 A. Because I've never seen the MGL policy until  
 10 this claim. I believe his whole life has been  
 11 involved --  
 12 Q. Are you aware that Mr. Cheglikov's specialty  
 13 is cargo insurance and not marine liability insurance?  
 14 A. Due to your personal relationship with  
 15 Mr. Cheglikov, I'm sure you're right.  
 16 Q. Okay. So what gave you the understanding --  
 17 A. I don't have that same relationship with  
 18 Mr. Cheglikov.  
 19 Q. What gave you the understanding that  
 20 Mr. Cheglikov was more familiar with marine general  
 21 liability policies than you other than you knew nothing  
 22 about them?  
 23 A. Based on recommendations from Mr. Boesen, he  
 24 was asked to, to join in and assist on this.  
 25 Q. We're talking about Mr. Cheglikov now.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

272

1 I've never made a study of it.  
 2 Q. What's the difference between reading and  
 3 studying it?  
 4 A. I believe memorization and application for  
 5 future use. I don't think I'll ever be exposed to  
 6 another MGL policy.  
 7 Q. Do you know if Willis, either Mr. Baker or  
 8 Mr. Bullock ever responded to Mr. Cheglikov's letter?  
 9 A. Yes, I believe Mr. Baker did respond to him by  
 10 email. I'm not sure, though.  
 11 Q. Isn't it also true that they disagreed with  
 12 the position taken in the Cheglikov letter?  
 13 A. I believe the entire time of this claim,  
 14 Mr. Baker and Mr. Bullock have disagreed with everything  
 15 we've done.  
 16 Q. So they all -- so it's your testimony then  
 17 that to this day, they disagree with Max Specialty's  
 18 refusal to permit Signal to allocate \$5 million of the  
 19 10 million primary payment to debris removal.  
 20 A. I cannot say what Mr. Baker and Mr. Bullock  
 21 has agreed to or disagreed to.  
 22 I believe they dropped the matter and pursued  
 23 the MGL insurers for the debris removal and left us out  
 24 of the claim further for debris removal.  
 25 Q. Isn't it true you're only left out of the

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

273

1 claim for debris removal because you refused -- because  
 2 Max refused to contribute to the debris removal?  
 3 A. Isn't that a right under the policy?  
 4 Q. No.  
 5 A. Why not?  
 6 Q. That's my opinion, but let's move on.  
 7 A. Oh. Can I object to your opinion?  
 8 Q. Let me show -- well, either Mr. Minx is right  
 9 or I'm right. Only Judge Kaplan will tell us.  
 10 Let's turn to Exhibit 155.  
 11 Do you recognize that email? Have you ever  
 12 seen that email? Do you recall ever seeing that email?  
 13 A. May I read?  
 14 Q. Please do.  
 15 A. (Reviewing the document).  
 16 I believe I've seen the lower section of the  
 17 email to Mr. Steve Boesen. I'm not sure that I have  
 18 seen the response from Mr. Boesen to Mr. Baker.  
 19 Q. Okay. You saw the response from -- by  
 20 Mr. Baker? I'm trying to get this straight now.  
 21 I'm focusing on the top email.  
 22 A. Response by Mr. Baker. There was no response  
 23 by Mr. Baker.  
 24 Mr. Baker initiated the communication.  
 25 Mr. Boesen responded.

275

1 received by me.  
 2 Q. Okay. So as of March 18th, 2010, Signal was  
 3 still attempting to allocate 5 million of the primary  
 4 \$10 million towards debris removal for the drydock,  
 5 isn't that correct?  
 6 A. As of that date of that email, yes.  
 7 Q. Okay. Again, none of these emails or none of  
 8 these facts are presented to Judge Kaplan in your  
 9 affidavit; is that correct?  
 10 A. Again, I rely on counsel as to the need for  
 11 them.  
 12 MR. NICOLETTI: I will pass the witness back  
 13 to Mr. Bland.  
 14 MR. GUY: Let's go off the record.  
 15 (Discussion held off the record.)  
 16 (A recess was taken from 6:14 p.m. until  
 17 6:23 p.m.)  
 18 EXAMINATION (Continued)  
 19 BY MR. BLAND:  
 20 Q. All right, Mr. Whittington. I'm back.  
 21 A. I never left.  
 22 Q. In your testimony with Mr. Nicoletti, you  
 23 referenced the Large Loss Report?  
 24 A. Yes.

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

274

1 Isn't that what it says?  
 2 Q. Isn't it true this email exchange occurs after  
 3 the Cheglikov letter is sent to Signal?  
 4 A. May I see that again?  
 5 Q. Yes.  
 6 Q. Okay.  
 7 A. One month two days.  
 8 Q. And doesn't it say in the, in the second  
 9 paragraph of Mr. Baker's email to Mr. Boesen, "In  
 10 response to your questions as to whether the insured  
 11 wishes to allocate a portion of the Ace claim, I refer  
 12 you to page 4 of Mr. Cheglikov's letter to Signal"?  
 13 A. I believe the document states that, yes.  
 14 Q. Does that refresh your recollection that  
 15 Mr. Baker was responding, was responding to the  
 16 Cheglikov letter?  
 17 A. To Mr. Boesen, not me.  
 18 Q. Yes.  
 19 A. To Mr. Boesen, not me.  
 20 Q. Right.  
 21 A. Okay. You've answered my question -- my  
 22 statement, yes.  
 23 Q. Were you ever shown this email at or about the  
 24 time it came in from Mr. Baker to Mr. Boesen?  
 25 A. I believe the bottom from Mr. Baker was

1 Q. Okay. And I think from your memory, you noted  
 2 that when the Large Loss Report was generated, there was  
 3 a question as to whether the drydock destroyed itself, I  
 4 think is the way you put it. Do you remember that?  
 5 A. Yes, the cause.  
 6 Q. And, in fact -- and that was early days,  
 7 right? That was in August 2009?  
 8 A. Yes.  
 9 Q. In fact, you since learned with the  
 10 September 2009 submission that we looked at, looked at  
 11 together, that the drydock sank as a result of operator  
 12 error, correct?  
 13 MR. BOWLES: Objection. That's a statement.  
 14 BY MR. BLAND:  
 15 Q. Correct?  
 16 A. Can I answer?  
 17 Q. Yes.  
 18 MR. BOWLES: Yes.  
 19 THE DEPONENT: Okay.  
 20 BY MR. BLAND:  
 21 Q. Do you want me to repeat it?  
 22 A. I believe I understood what you said.  
 23 Based on the statements from Signal's  
 24 employees, that's what it appeared to have occurred.  
 25 Q. Right.

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

ZAHN COURT REPORTING  
NORFOLK RICHMOND  
757.627.6554 804.788.8899

293

1 a preliminary claim statement from Signal.  
 2 A. Correct.  
 3 Q. November of 2009.  
 4 A. Yes.  
 5 Q. We looked at that together.  
 6 Did you respond to that preliminary claim  
 7 statement?  
 8 A. No.  
 9 Q. Have you ever responded to it?  
 10 A. No.  
 11 Q. Why not?  
 12 A. I am waiting for the underlying carrier to  
 13 exhaust to trigger my coverage.  
 14 MR. NICOLETTI: What's the date on that?  
 15 MR. BLAND: It's November 17 -- I'm going to  
 16 find it.  
 17 BY MR. BLAND:  
 18 Q. It's November 17, 2009. It's Exhibit 210,  
 19 okay? And as I understand it, you've never responded to  
 20 Signal's preliminary claim statement; is that correct?  
 21 A. Of August 20, 2009? No.  
 22 Q. Well, that's the date of loss, August 20,  
 23 2009.  
 24 A. Oh. Whatever the date is.  
 25 Q. The claim is November 17, 2009.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

295

1 claiming.  
 2 Q. Okay. Do you know when you sent -- at what  
 3 point you sent your declination letter, the first one?  
 4 A. I believe that was November 19th or 29 --  
 5 29th --  
 6 MR. BOWLES: 2010.  
 7 THE DEPONENT: -- 2010. I'm sorry.  
 8 BY MR. BLAND:  
 9 Q. So just listen to my question. Your letter  
 10 declining Signal's claim was issued one year after that  
 11 preliminary claim statement which is Exhibit 210; is  
 12 that right?  
 13 A. That's correct.  
 14 Q. And do you know when Ace exhausted their  
 15 limits?  
 16 A. After asking them, apparently they made  
 17 payments in January of 2010.  
 18 Q. So after -- if you look at Whittington  
 19 Exhibit 208, please, and go to the entry -- it's the one  
 20 we looked at -- or it's on the page we looked at earlier  
 21 that has a cutoff entry, but this one is complete.  
 22 If you look at the January 7, 2010 entry.  
 23 It's the first full entry on the page.  
 24 A. Okay.  
 25 Q. And it's a note from you, Cody Whittington,

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

294

1 A. Okay.  
 2 Q. Is that correct?  
 3 A. Yes.  
 4 Q. And as we sit here today, Max Specialty has  
 5 never responded to this claim; is that correct?  
 6 MR. BOWLES: This letter, you mean?  
 7 MR. BLAND: No, to the preliminary claim  
 8 statement.  
 9 THE DEPONENT: I think we've issued  
 10 declination letters to everything the insured  
 11 claimed.  
 12 BY MR. BLAND:  
 13 Q. Isn't it a fact -- and we'll look at it -- but  
 14 you did not -- this preliminary claim statement is dated  
 15 November 17, 2009, correct?  
 16 A. Right.  
 17 Q. And you did not issue what you call your  
 18 declination letter until November of 2010, a year later;  
 19 is that correct?  
 20 A. No. We issued two letters of declination. We  
 21 also awaited Ace/Westchester's exhaustion of their  
 22 limits and payment. We then scheduled meetings for the  
 23 BI with the insured who cancelled the first meeting. We  
 24 were asking questions concerning the newly acquired  
 25 claim because we didn't understand what they were

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

296

1 and it says, "Email from Ace, they have exhausted their  
 2 limits." Is that correct?  
 3 A. I'm on the wrong -- okay, yes.  
 4 Q. January 7, 2010, 3:54 p.m.?  
 5 A. Right.  
 6 Q. In quote, Email from Ace, they have exhausted  
 7 their him, period, end quote.  
 8 A. Correct.  
 9 Q. Why didn't you respond to Signal's claim at  
 10 that time?  
 11 A. At that time we were awaiting the surveyor's  
 12 report for payment of the remaining amount on the  
 13 drydock. We were also investigating the bodily injury  
 14 claim, awaiting additional information from the insured  
 15 and scheduled meetings that occurred later.  
 16 The issue of wreck removal and debris removal  
 17 appeared to be resolved.  
 18 Q. But you didn't respond to Signal, did you?  
 19 A. What type of response should I send?  
 20 Q. To their claim.  
 21 You didn't send a response to Signal of any  
 22 kind.  
 23 A. Well --  
 24 MR. BOWLES: Objection.  
 25

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

377

1 A. I believe there's an email in the documents  
 2 where I asked did he -- did he retain Minx, which would  
 3 indicate to me that I never approved retention of  
 4 Mr. Minx.  
 5 Q. Do you recall sending Mr. Cruikshank an email  
 6 saying, "Ken, please assign the debris portion of this  
 7 claim for review by Donato, Minx, Brown?  
 8 A. To my memory, I don't remember. Maybe that's  
 9 why I asked him in the second email did they do that.  
 10 Q. Isn't it also true you were telling -- you  
 11 were advising Cruikshank that you were contemplating  
 12 assigning Cozen, which is the Cozen O'Connor law firm,  
 13 to review the entire file?  
 14 A. No.  
 15 Q. You never said that.  
 16 A. Never said that.  
 17 MR. NICOLETTI: Let me have this marked as  
 18 236.  
 19 (Email dated October 22, 2009 from Whittington  
 20 to Cruikshank was marked Deposition Exhibit Number 236.)  
 21 BY MR. NICOLETTI:  
 22 Q. Can you read -- is that an email from you to  
 23 Mr. Cruikshank?  
 24 A. Yes.  
 25 Q. And dated October 22nd, 2009?

379

1 A. Correct.  
 2 Q. Okay.  
 3 A. Per this email, that's what it's stated.  
 4 But I believe your questions were did I choose  
 5 Donato Minx.  
 6 Q. I think we're playing semantics here.  
 7 A. I think we are, too, to your benefit.  
 8 Q. When you said, "We are contemplating assigning  
 9 Cozen," who is the "we" you referred to?  
 10 A. Max Specialty.  
 11 Q. Okay. Just want to make sure it's not Ace.  
 12 It's not Ace. It's just Max contemplating  
 13 assigning this claim to Cozen; is that correct?  
 14 A. Yes.  
 15 Q. Did you ever retain Cozen?  
 16 A. No. My information is Ace/Westchester did.  
 17 Q. Now, isn't it true as of November 2nd, 2009,  
 18 you already knew Ace was paying its \$10 million?  
 19 A. No.  
 20 Q. Isn't it also true that as of November 2nd,  
 21 2009, you were telling the Donato Minx firm to report to  
 22 you as if you were the primary insurer on this matter?  
 23 A. I remember doing that, but the date I'm not  
 24 sure.  
 25 Q. I'll help you with the date.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

380

1 A. Yes.  
 2 Q. Can you read it into the record, please?  
 3 A. "Ken, please assign the debris portion of this  
 4 claim for review by Donato, Minx, Brown. We are  
 5 contemplating assigning Cozen the entire file after  
 6 review per Donato."  
 7 Q. Does that refresh your recollection that you  
 8 were the one who instructed Mr. Cruikshank to retain  
 9 Donato, Minx & Brown?  
 10 A. I think your question was concerning Cozen.  
 11 Q. No.  
 12 A. Assigning Cozen.  
 13 Q. No.  
 14 My first question was does that refresh your  
 15 recollection that it was you and not Ace/Westchester  
 16 that directed Mr. Cruikshank to retain Donato, Minx &  
 17 Brown?  
 18 A. I believe this email is a response to  
 19 Ace/Westchester and/or Mr. Cruikshank asking if they  
 20 should assign it to them -- to him.  
 21 I did not make the choice of Mr. Minx. I've  
 22 never heard the name of the firm before.  
 23 Q. I'm not saying you made the choice for the  
 24 Donato Minx firm. But you're the one who's directing  
 25 Mr. Cruikshank to assign the claim to them.

1 A. I knew you would.  
 2 MR. NICOLETTI: Let's have this marked as  
 3 Whittington Exhibit 237. It Bates production  
 4 control numbers MSI 000472 through 000475.  
 5 (Email Chain dated November 2, 2009 from  
 6 Whittington to Minx was marked Deposition Exhibit  
 7 Number 237.)  
 8 BY MR. NICOLETTI:  
 9 Q. Mr. Whittington, is that your email to bminx  
 10 dated November 2nd, 2009?  
 11 A. Yes.  
 12 Q. Does that refresh your recollection -- please  
 13 read the paragraph to yourself -- actually, no, read it  
 14 into the record.  
 15 A. Which paragraph?  
 16 Q. The whole email.  
 17 A. From: Cody Whittington.  
 18 Sent: Monday November 2, 2009, 11:19 a.m.  
 19 To: Bminx@donatominxbrown.com.  
 20 CC: Ken.Cruikshank@yorkisg.com.  
 21 Subject: RE AFDB-5 drydock (Signal).  
 22 "Good morning, we have never spoken on this  
 23 file and I wished to introduce myself. Please note we  
 24 are not Max Re. It does make a difference. In that the  
 25 debris coverage may fall to us for settlement, please

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

381

1 keep us informed of developments as primary insurer on  
 2 this matter. Please let me know if there is anything we  
 3 can help you with."

4 Q. Does that refresh your recollection that as of  
 5 November 2nd, 2009, you knew that Ace/Westchester was  
 6 going to pay its \$10 million under the primary property  
 7 program?

8 A. The information I had was from Ken  
 9 Cruikshank's report (indicating). I had no definite  
 10 information that Ace/Westchester was going to make the  
 11 payment.

12 Q. Well, if you had no information that  
 13 Ace/Westchester was going to make that payment, why are  
 14 you telling Donato, quote, Please keep us informed of  
 15 developments as primary insurer on this matter?

16 A. Expecting that Ace/Westchester would pay  
 17 inevitably, that statement is correct.

18 Q. So as of November 2nd, 2009, you knew that  
 19 Ace/Westchester was definitely going to pay the  
 20 10 million. You just didn't know when, isn't that  
 21 correct?

22 A. After speaking to representative of  
 23 Ace/Westchester concerning the coverage questions and  
 24 review of Cruikshank's reports, it appeared that's what  
 25 they were heading to.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

383

1 Signal not to use the drydock without extensive repairs?  
 2 A. Yes.  
 3 Q. Have I reported to you on Heger Drydock  
 4 recommendations regarding pontoon replacement if they  
 5 didn't do extensive repairs?

6 A. Yes.

7 Q. Have I reported to you on the need for pumping  
 8 of tanks of the pontoons of the drydock when oil rigs  
 9 were on board that sometimes required pumping every  
 10 hour?

11 A. Yes.

12 MR. BLAND: Object to the form. It's leading.

13 BY MR. BOWLES:

14 Q. Did I report to you and Steve Boesen that  
 15 Signal admitted that it never made any of the repairs  
 16 recommended by Heger?

17 MR. GUY: Object to the form.

18 THE DEponent: Yes.

19 BY MR. BOWLES:

20 Q. Have I reported to you on the repairs  
 21 recommended by the Deloitte -- Dufour Laskay firm?

22 A. Yes.

23 Q. And have I reported to you that Signal never  
 24 made any of those repairs either?

25 A. Yes.

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

382

1 MR. NICOLETTI: I have no further questions.  
 2 MR. BOWLES: Ten-minute break, and I'll have a  
 3 few questions.

4 MR. NICOLETTI: If you have a few questions,  
 5 go to it. It's already 9:30.

6 MR. BOWLES: I know. This has taken a long  
 7 time. I need ten minutes.

8 (A recess was taken from 9:26 a.m. until  
 9 9:37 a.m.)

EXAMINATION

10 BY MR. BOWLES:

11 Q. Okay. Mr. Whittington, coming back to your  
 12 testimony earlier this morning, you said you first  
 13 became employed by Max Specialty in 1998.

14 Is that a correct statement, sir?

15 A. No. It's 2008. I've worked for a company  
 16 that's only in business for about four, five years.

17 Q. Now, we've had a lot of discussion about  
 18 information here.

19 Have I reported to you and to Steve regarding  
 20 a large number of reports in Signal's files from the  
 21 Heger Drydock Company?

22 A. Yes.

23 Q. Have I reported to you on its warnings to

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899

384

1 MR. GUY: Object to the form.

2 MR. BLAND: Leading.

3 MR. GUY: And also misstates the facts.

4 MR. NICOLETTI: Mr. Bowles, I deem this entire  
 5 line of questioning to be a waiver of the  
 6 attorney-client privilege. I hereby demand  
 7 production of all your written reports to Signal on  
 8 this case -- to Max Specialty on this case.

9 MR. BLAND: I absolutely join in that.

10 MR. BOWLES: Objection. We'll take that under  
 11 advisement, but I don't think that's going to be  
 12 done.

13 MR. NICOLETTI: Whether it's done by you  
 14 voluntarily or not, only the District Court will  
 15 tell us whether you've waived all your privileges.

16 MR. BLAND: Keep asking those questions,  
 17 please.

18 MR. NICOLETTI: You've now been duly warned.

19 BY MR. BOWLES:

20 Q. You've been shown a number of reports by the  
 21 Dufour company, CBIZ, Mr. Cuevas, the Heller company and  
 22 someone retained by Mr. Cesare, Mr. Falzarano, I  
 23 believe.

24 Do you know if Signal provided to them all of  
 25 the information it had from the Heger company regarding

ZAHN COURT REPORTING  
 NORFOLK RICHMOND  
 757.627.6554 804.788.8899